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THE

LAWS

RESPECTING

COMMONS AND COMMONERS;

COMPRISING THE LAW RELATIVE TO THE RIGHTS AND PRIVILEGES OF BOTH LORDS AND COMMONERS.

AND IN WHICH

THE LAW RELATIVE TO THE

INCLOSING OF COMMONS,

IS PARTICULARLY ATTENDED TO

AS COLLECTED FROM THE SEVERAL

Statutes, Reports, and other Books of Authority,

UP TO THE PRESENT TIME.

TO WHICH IS LIKEWISE ADDED AN

APPENDIX

CONTAINING THE MODE AND EXPENCE OF PROCEEDING IN THE HOUSES OF LORDS AND COMMONS, FOR THE PURPOSE OF OBTAINING ACTS OF PARLIAMENT FOR THE

INCLOSING OF COMMONS AND OTHER WASTE LANDS.

SECOND EDITION, CORRECTED AND ENLARGED.

BY THE AUTHOR OF THE LAWS OF LANDLORD AND TENANT, LAW OF WILLS, LAWS OF MASTERS AND SERVANTS, &c.

LONDON:

Printed for W. CLARKE and SONS, Portugal-Street, Lincoln's-Inn,

1806.

[Price Three Shillings, Sewed.]

W. Flint, Printer, St. Sepulchre's.

ADVERTISEMENT.

THE Sheets with which the Public are now presented, are intended to form the Third Division of the *second* and *last* Volume of the LAW SELECTIONS. Our attention has been directed to the LAW of COMMONS and COMMONERS, not only on account of the universal extent and utility of the subject, but likewise of the importance which it has of late assumed by the consideration given to it by the Legislature; the provisions of which it is material that both *Lords* and *Commoners* should be acquainted;—and that they may become so in the fullest manner, and at a small expence, is the chief design of the present Compilation.

The next object of our attention will be the LAW relating to TRAVELLERS and TRAVELLING, which will complete the design we originally had in view of forming, under the above Title, a Collection of familiar Treatises on such subjects of the Law, as appeared to be of the most general utility and importance.

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THE

LAWS

RESPECTING

COMMONS AND COMMONERS.

CHAP. I.

Of the Original, Nature, Qualities, and Kinds of Common.

THE word *Communia*, or Common, as taken ſubſtantively, and uſed as a term of art, properly ſignifies a right or privilege which one or more perſons claim to take or uſe ſome part or portion of that which another man's lands, waters, woods, &c. do naturally produce, without having any property in ſuch land, water, wood, &c. for he that has the property is the lord, or owner of the thing, which property, in this ſenſe, cannot be ſaid to be common; ſo that common and property, in our legal ſignification, ſeem repugnant. Definition.

Commons, in this ſenſe, are generally divided into four kinds, viz. Diviſion.

1. Common of paſture, which is a right, or liberty, which one or more have to feed or fodder their beaſts or cattle in another man's lands, &c.

2. Common of turbary, which is a right, or liberty, of digging turf in another's land or ſoil.

3. Common of piſcary, or of fiſhing, which is a right, or liberty, of taking fiſh in another's fiſhpond, pool, or river; and

4. Common of eſtovers, which is a right, or liberty, of taking trees or loppings, ſhrubs, underwoods, &c. in another man's woods, coppices, &c.

Common of eſtovers are, however, generally called boots, or botes, and they are of four kinds, viz. Species of common of eſtovers.

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1. The greater houſe-bote, called *eſtoveria ædificandi*, which is a liberty to fell and take timber-trees, &c. either to repair ruinous houſes, or to rebuild ſuch as are proſtrate by tempeſt, enemies, &c.

2. The leſſer houſe-bote, or *eſtoveria ardendi*, which is a like liberty to cut and take tops and lops, or ſhrubs and underwoods, or old decayed and dead trees, to burn in the houſe or tenement.

3. *Eſtoveria arandi*, or plough-bote, which is a like liberty to cut and take proper timber, and other ſtuff, for mending the tenant's ploughs, carts, wains, and harrows, and for making rakes, forks, &c. neceſſary for getting in his hay and corn.

4. *Eſtoveria claudendi*, or eſtovers of incloſure: this is uſually called hedge-bote, and is a liberty to take either proper timber for making gates, ſtiles, &c. or boughs, ſhrubs, buſhes, &c. to repair hedges and fences, or to incloſe open fields, where corn is ſown, &c.

A fifth kind of common is ſometimes reckoned that liberty which the tenants in ſome manors have of digging and taking ſand, gravel, ſtone, coal, ore, &c. in the lord's ſoil, pits, quarries, or mines; for which ſee *Co. Lit.* 41 *b*. Though this kind of common may well be reduced under the head of turbary.

CHAP. II.

OF COMMON OF PASTURE.

Species of common of paſture.

COMMON of paſture, which is the moſt uſual ſpecies of common, and of which therefore we ſhall principally treat, is divided into four ſorts, viz.

I. Common appendant.
II. Common appurtenant.
III. Common in groſs.
IV. Common *pur cauſe de vicinage (a)*.

(a) Another ſort of common of paſture may be that which in Norfolk is called Shack, concerning which ſee Sir Miles Corbet's caſe, in 7 *Co. & Poſt. Ch.* 7. § 2.

PASTURE.

The original and commencement of common of paſture, &c. ſeems to have been briefly thus: when the ancient kings of England diſtributed to their lords, or barons, certain circuits of ground, conſiſting for the moſt part of arable, paſture, waſte and wood lands, called manors; they had a petty royalty and juriſdiction over thoſe that lived within their precincts, and in conſideration of the performance of civil or military ſervices, or yielding ſuch rents in corn, ſheep, &c. as was agreed upon between them, they built them houſes and diſtributed parcels of arable land to ſuch their tenants, when villenage began to be worn off; but as the tenants could not live ſo as to pay and perform their rents and ſervices without cattle to manure and plough thoſe lands, and ſuch cattle could not live without feeding or paſture; therefore it was neceſſary for them to feed ſuch cattle upon the waſte or paſture, within the juriſdiction of the manor, or ſome other of the lord's waſtes in other places, which the lord granted and allowed; this in proceſs of time being looked upon as a thing incident to their tenures, grew to a preſcription, and conſequently to a right *(a)*.

The original of common.

Now the nature of common, I mean common of paſture, which is the moſt general common, is a feeding with the mouths of the cattle; and common appertains not to the tenant, nor is it his, until it is taken by the mouths of his cattle; and therefore if a ſtranger cuts the graſs, the commoner cannot take it away, nor have an action of treſpaſs.

The nature.

(a) And becauſe the tenants could not live and perform their ſervices without fire, nor repair their houſes or fences without timber and wood, therefore of neceſſity alſo they muſt have common of eſtovers in ſome parts of the manor, or in ſome other of the lord's woods near and convenient; the like of the common of turbary, *&c.*

PASTURE.

I. COMMON APPENDANT.

In considering this species of Common, we shall enquire into.

1. *The Definition, Original and Nature of it.*
2. *To what it shall be said to be appendant.*
3. *The several Sorts thereof.*
4. *How Title shall be made to it.*
5. *With what Beasts it shall be used and taken, and with what not.*

Definition.

1. *The Definition, Origin, and Nature of Common Appendant:*

COMMON appendant is, where a man is seised of certain arable lands in respect to which he hath had, time out of mind, common in the soil of another, for himself and all those who shall be seised of the said land; there he shall have common for beasts commonable, viz. such as manure or compasture the same land to which the common is so incident or appendant. See *Terms of the Law*, and *Rowel.* 4 *Co.* 37. 2 *Inst.* 99.

Original.

When the lord of a manor, in which there were great waste grounds, infeoffed others of certain parcels of arable land, that the feoffees might have common in the said wastes for beasts necessary to plough and compasture the land; for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture, and consequently the tenant must have common in the wastes of the lord for the beasts which ploughed and manured or compastured his tenancy; and this was tacitly implied in the feoffment, and incident to it. 4 *Co.* 67. *Co.* 2 *Inst.* 96. *Perk.* 670.

And therefore if the lord of a manor, before the stat. *quicemptores terrarum*, had made a feoffment of part of the manor, to hold of him, the feoffee would have had common in the lord's wastes as incident or appendant to his grant. 1 *Rol. Abr.* 390. C.

Nature.

As to the nature of this species of common, it is to be observed, that common appendant is of common right, as appears by the statute of Merton, ch. 4. and it must have been time out of mind, and commence by operation of law; and for this one need not prescribe. It cannot be severed from the soil by grant, without being

extinguiſhed; therefore a preſcription to have common appendant, not ſaying to what land, ſhall be void; and if it is appendant to land, a preſcription to it is ſurpluſage. For its being appendant implies preſcription, and therefore it is needleſs to preſcribe to it. It is not common appendant, unleſs it had been appendant time out of memory, &c. therefore ſuch common may not be created at this day. 4 *Rep.* 37. Tirringham's caſe. 2 *Brownl.* 298. *Cro. Car.* 542. in Daniel's caſe. 1 *Roll. Abr.* 401. 4 *Rep.* 37, 38. 1 *Roll. Abr.* 396. 26 *H.* 8. 4. PASTURE.

The lord may have common appendant in his own tenancy; this common is natural, for the lord has right of common in the lands of the tenant, and the tenant in the lands of the lord. 2 *Inſt.* 85, 474. 2 *Brownl.* 298.

2. *To what it may be ſaid to be Appendant.*

Common appendant is only appendant to ancient *arable* land, and not to meadow, paſture, or to an houſe; and though ſome part may be converted to paſture, yet the pleading muſt be, that it is appendant to land. 4 *Rep.* Tirringham's caſe. 26 *H.* 4. To ancient arable land.

It cannot be appendant to land, which is approved out of the waſtes of the lord within time of memory. But one may preſcribe to have common appendant to his manor, viz. to ſuch demeſnes which are arable land. 5 *Aſſ.* 2. 4 *Rep.* 37. *b.* Not to land approved.

But common may be appendant to a *carve* of land, and yet a carve of land may contain paſture, meadow and wood; but it ſhall be applied to that with which it agrees: and ſo to a manor, but this ſhall be intended to the demeſnes of the manor; and therefore if a tenancy eſcheat, the lord ſhall not increaſe his common by reaſon of that. There muſt be a congruity between the thing appendant, and the object to which it is appendant. 4 *Rep. ibid.* 3 *Aſſ.* 2 *Inſt.* 122. To a carve of land. To a manor.

So it may be common appendant, though it belong to a manor, a farm, or a plough-land; and though it be on condition only to have common in it when it is not ſowed, &c. 4 *Co.* 37. To a farm, plough land, &c.

But if one and his anceſtors, and all thoſe whoſe eſtate he hath in a houſe, have had common of paſture for a certain number of beaſts, *levant*, &c. in a certain place: this is not common appendant but appurtenant. 11 *H.* 6. 12.

PASTURE. But though common appendant can only be appendant to arable land; yet if a houſe be afterwards built upon that which was at firſt arable; or if part of it be converted into meadow or paſture, yet it ſtill may be claimed as common appendant. And he ſhall have this common for all his beaſts which he keeps upon that which was anciently arable land, though ſince converted to meadow, &c. 4 *Co.* 37.

He that claims common by force of a preſcription, as an inhabitant of a village, ſhall have no other beaſts to common there but thoſe that are *levant* and *couchant* within the village. 1 *Roll. Abr.* 398. G.

In ſome places the lands of the owners lie intermixed in little parcels in large fields, and they uſe there to intercommon promiſcuouſly from harveſt till the land be ſowed again; this muſt be common appendant. And in ſuch caſe, though any of them encloſe his part of ſuch field, yet the reſt may take common with him afterwards in his incloſure as they did before. This in Norfolk is very uſual, and is there called ſhack. 7 *Co.* 5.

Shack. Alſo if in one town one has divers parcels of land incloſed together, in which the inhabitants have uſed to have ſhack by paſſage into it, by bars and gates, with their beaſts; this is to be taken as common appendant or appurtenant. But if in the towns of D. and E. the uſage hath been, that every owner hath uſed to incloſe his own lands from time to time, and ſo to hold it in ſeveralty; there the uſage proves it originally to be but in nature of ſhack, becauſe of vicinage; and therefore he may incloſe and hold it in ſeveralty. And if a man has an ancient cloſe anciently taken out of ſuch a common field, as above, and he, and all whoſe eſtate he hath, have held the ſame in ſeveralty, he may claim to hold it ſo ſtill. And as to that parcel ſo incloſed the ſhack retains its original nature. And per Coke, he who claims ſhack there may not preſcribe to have common in it. 7 *Co.* 6. See *Brook* Tit. *Common*, 35.

Note, In the caſe of the King v. Fox, Mich. 6 W. and M. in *B. R.* it is admitted, that the inhabitants of one pariſh may have common appendant in waſte grounds, which lie in another pariſh. And in that caſe, on the queſtion, whether the commoner ſhould be aſſeſſed for taxes in the pariſh where the waſte lay, or in that where his farm lay? it was held, he ſhould be aſſeſſed, &c.

in that where his farm lay: for the common is incident, and will paſs by the grant of the farm, &c. So that it is to be conſidered as a part thereof, and the farm is to be taxed the higher. *Salk.* 169. PASTURE.

And though it be ſaid in ſome of the books, that common cannot belong to a houſe or cottage; yet in the caſe of Emerton v. Selby, Hil. 2 Anne, it was held, that one may preſcribe for common appendant to his cottage; for a cottage contains a curtilage at leaſt; and there is no difference between a curtilage and a meſſuage, as to the appendancy of common; alſo a cottage has at leaſt a court-yard belonging to it. And Holt, Chief Juſtice, ſaid, he remembered the trial of an iſſue, whether *levant* and *couchant*, before Hale, Chief Juſtice, who held, that fodd'ring of cattle in the yard was good evidence of levancy and couchancy *(a)*. 6 *Mod.* 144. *Salk.* 189. See *poſt*. 2 Saund. 251, Vaugh. 263.

It is likewiſe ſaid in *Vaugh.* 253. That in common intent cattle cannot be *levant*, &c. upon a meſſuage only. But in 2 *Brownl.* 201. it is held, that beaſts may well be ſaid to be *levant* and *couchant* upon a houſe, viz. either upon a curtilage belonging thereto, or upon the houſe itſelf, viz. as many as may be tied therein, or are uſual to be maintained therein. But this ſeems to be of common appurtenant and not appendant. 5 *Term Rep.* 46. 49. And therefore ſee and note the difference between common appendant and common appurtenant, in *Sec.* II. And it is ſaid that new erected cottages, even though they have four acres of ground laid to them, have no right of common in the waſte. 2 *Inſt.* 740.

Common of turbary may not be appendant to land, but to a houſe it may. 4 *Rep.* 37. For the appendancy is to follow the nature of the thing to which it is appendant.

A parſon may have common appendant to his parſonage, out of the lands of an abbot. *Goldb.* p. 4. 2 *Inſt.* 86.

(a) The ſtatute called *extenta manerii*, 4 Ed. I. ſays, a cottage contains a curtilage. And by the ſtat. 31 Eliz. ch. 7. A cottage ought to have four acres of land. *Co. Lit.* 5. *b.* 2 *Inſt.* 736. 1 *Bulſt.* 50. And ſee 5 *Term Rep.* 46. 49.

PASTURE.

3. *The Sorts of Common Appendant.*

Q. 1 Roll. 379. For a commoner may preſcribe to have common per totum annum, &c.

Common appendant may be either unlimited in time, as for the whole year, or it may be limited to a time, or upon condition, as ſo long as he ſhall pay ſo much, or ſo long as he ſhall be reſident upon the houſe, to which the common is appendant. 37 *H.* 6. 32. 17 Ed. 3. 26. 4 *Co.* 37.

Alſo common appendant may be to a commoner in arable land, after the corn ſevered until it be reſown; ſo for two years after the corn cut, and not for the third; ſo in a meadow after the graſs is cut until Candlemas; ſo in paſture, from the feaſt of St. Auguſtin till All Saints. So it may be to put his beaſts therein for any limited time certain. See 7 *Co.* 5. 1 *Rol.* 397.

A man may have common appendant for 30 beaſts in one place, and alſo common appendant to the ſame land in another place for part of the ſaid beaſts; and ſo may take where he will. 17 *Ed.* 3. 34. See 1 *Rol. Abr.* 397. D.

4. *With what Beaſts it ſhall be uſed and taken, and with what not.*

With horſes and oxen to plough the land. 37 *H.* 6. 34. 10 *Ed.* 4. 10. *b.*

So for cows and ſheep to compaſture the land. It may not be uſed but with the beaſts, which are for manuring or compaſturing of the land. It ſhall not be uſed with goats or geeſe, &c. and therefore preſcription to have common for all manner of beaſts is not good; becauſe this comprehends goats, ſheep, and the like. But ſuch is common appurtenant. And the words for all beaſts are underſtood all commonable beaſts. 37 H. 6. 34. *Per Cur.*

Common appendant, without number, how.

Now common appendant may be limited to a certain number of beaſts by uſage, though it is in its own nature without number, becauſe it is to have ſufficient paſture for the beaſts; and the common is meaſurable according to the quality and quantity of the freehold, to which he claims to have this common appendant, viz. for all thoſe which are *levant* and *couchant* upon the land, to which the common is appendant. 17 *Ed.* 3. 27. 37 *H.* 6. 34. 10 *Ed.* 4. 10. *b.* 15 *Ed.* 4. 32. *b.*

And ſo many cattle as the land to which the common appertains can maintain in the winter, are ſaid to be *levant* and *couchant* there. *Noy*, 30. *Vent.* 54. 5 *Term Rep.* 6.

And ſo my Lord Coke in his comment on the ſtatute of Merton, ch. 4. Though common appendant be without a certain number, as to have ſufficient paſture for beaſts: yet the words in the ſtatute of Merton, ch. 4. *quantum pertinet ad tenementa ſua*, i. e. as much as belongs to his tenement, may be reduced to a certainty, for that is certain which may be made ſo; and common appendant, be it certain or uncertain, is within the ſtatute of Merton. 2 *Inſt. p.* 86.

Not with the beaſts of a ſtranger.

Regularly, this commoner may not uſe the common, but with his own proper beaſts; and he may not *agiſt* the beaſts of a ſtranger; but if he has any temporary or ſpecial property in them he may: as ſuppoſe he has not any beaſts to manure his land, he may hire other beaſts to manure it, and then he may uſe the common with them, for hiring makes them in a manner his own beaſts: ſo if he take the beaſts of a ſtranger to fold, and fold them accordingly, being *levant* and *couchant* upon the land, he may uſe the common with theſe beaſts; for he hath a ſpecial property in them for the time. 11 *H.* 6. 22. *b. Mich.* 10 *Car. in B. R.* Jaſon and Hellyard.

It is agreed in Rumſey's caſe, 2 *Keb.* 504. that a man cannot put in the beaſts of a ſtranger, but only to compaſture his land. 2 *Keb.* 504.

As for extinguiſhment or apportionment of this ſort of common; ſee *poſt.* tit. *Extinguiſhment & Apportionment.*

And ſee more of the differences between common appendant and appurtenant in the following ſection.

PASTURE.

II. OF COMMON APPURTENANT.

1. *The Nature of it. The Diverſities between Common Appendant, and Common Appurtenant.*
2. *To what it ſhall be ſaid to be Appurtenant.*
3. *And how it ſhall be uſed, and with what Beaſts.*

1. *The Nature of Common Appurtenant.*

COMMON appurtenant is much of the nature of common appendant, but it differs in ſeveral particulars: as it may be uſed not only with beaſts commonable, as horſes, oxen, kine and ſheep; but with beaſts not commonable, as goats, geeſe, hogs: and the judges favour this ſort of common appurtenant if it can any ways be made good; as may be obſerved in Stone and Muſſenden's caſe before cited, and other caſes hereafter.

Differences between common appendant and appurtenant.

For the farther illuſtration of common, I ſhall ſhew in what particulars common appendant and appurtenant differ.

Though common appendant and common appurtenant are frequently confounded in our books, and oftentimes miſtaken the one for the other, yet it appears by what is before ſaid, that they differ in their kind, nature, and quality: but for clearer diſtinction between them, obſerve the following differences.

1. Common appendant may not be created at this day, nor can it ariſe within time of memory, but muſt grow by long uſage and preſcription, time out of mind; but common appurtenant may be newly granted or created at this day, though it may alſo ariſe by uſage, &c.

2. Common appendant is only to be taken and claimed, for and by reaſon of antient arable land only; but common appurtenant may be claimed and taken for or by reaſon of a houſe or cottage, or for any other land, beſides arable, as meadow, paſture, &c.

3. Common appendant can only be taken and claimed for ſuch cattle, as manure or compaſſure, i. e. marl or dung the land; but common appurtenant may be for all manner of beaſts whatſoever.

4. Common appendant is only to be taken with and claimed for ſo many beaſts or cattle only as will ſerve to manure and compaſture the land; but common appurtenant may be for beaſts without number. PASTURE.

5. The appendant muſt be claimed for and taken with the beaſts, only while they are *levant* and *couchant* upon the land, to which it is appendant; but common appurtenant may be claimed for and taken with beaſts that go and are kept in any place whatſoever.

6. The appendant muſt be taken within meaſure, i. e. in proportion to the land to which it is appendant. As if it be appendant to one acre, the common ſhall be only for ſo many beaſts as will manure and dung that acre; and if he take the common with more beaſts, the reſt of the commoners may have a writ of admeaſurement of paſture to reſtrain him; but common appurtenant may be had and taken by beaſts without number. And it ſeems no writ of admeaſurement will lie in the caſe of common appurtenant. See 8 *Co.* 70. 6 *Co.* 60. 4 *Co.* 38. 4 *E.* 4. 29. 15 *E.* 4 32. 9 *E.* 4. 3.

7. Alſo common appendant cannot be ſevered from the land to which it belongs, (either by any act of God, or of the law, or of the parties, as it is ſaid, (*ſed quære*) but common appurtenant may (in many caſes) be ſevered from the houſe, land, or other thing to which it is appurtenant.

8. Yet common appendant may be extinguiſhed by unity of all the land and the common; and ſo it may by diviſion of the land, &c. But for common appurtenant it is queſtionable. See *Moore*, Caſe 654.

9. But purchaſing part of the land in which is common appendant, does not extinguiſh the common; otherwiſe it is of common appurtenant. 1 *Brownl.* 180.

10. If one preſcribes for common, as appendant to that which is againſt the nature of common appendant, this ſhall not be common appendant, but rather appurtenant or in groſs. *Cro. Com.* 13.

11. And if theſe words, common appendant to the houſe or tenement, &c. be in a grant, this will not create a common appendant, that was not appendant before. 1 *Bulſt.* 18. And if the title to common be made as appendant, time out of mind, to a houſe, meadow or paſture, as well as arable land, this muſt be common appurtenant and not appendant. 4 *Co.* 36.

PASTURE. 12. If a lord of a manor, within which are divers waſtes, grants to another certain lands within the manor, and common within the waſtes thereof, with all his beaſts, this is common in groſs, and neither appendant nor appurtenant. But if it were ſet down with what beaſts in certain the common ſhould be taken, it were common appurtenant. 3 *Inſt.* in the caſe of Stamford and Burgeſs, *Shep. Abr. Common* 381.

13. One preſcribed to have common appertaining to his houſe and land, in the land of *A.* and in the land of *B.* and this was held to be common appurtenant, and not appendant. 4 *Co.* 37. *Goldſb.* 114.

14. So if a man has common of eſtovers in a certain place, time out of mind, to be burnt in his houſe, and to amend his old houſes and hedges, this is not common appendant, but only appurtenant. 11 *H.* 6. 11. 1 *Rol. Abr.* 399. L.

15. Note, Per Anderſon Chief Juſtice. There is no common by common right, but only common appendant. *Goldſb.* 114.

2. *To what it ſhall be Appurtenant.*

It may be appurtenant to meadow, paſture, &c. Tirringham's caſe.

To a houſe. So it may to a houſe, cottage, curtilage, &c.

If a man and his anceſtors, and all thoſe whoſe eſtate he hath in an houſe, have had common for two beaſts in a certain place; this is not common appendant, but appurtenant. 11 *H.* 6. 12.

If a man grant common to another for all his beaſts, which ſhall be *levant* and *couchant* upon Black Acre, or which ſhall manure or depaſture Black Acre; this is common appurtenant to Black Acre. See *Plowd. Com.* 381. *a.*

3. *How Common Appurtenant ſhall be uſed, and with what Beaſts.*

It may by cuſtom or preſcription be uſed with horſes, oxen, cows, ſheep, goats, hogs, and all beaſts, at all ſeaſons of the year, that is, according to the uſage or grant; and though ſuch beaſts are not commonable beaſts.

With beaſts levant and couchant. But regularly, common appurtenant is only for beaſts *levant* and *couchant*, and he who claims only common appurtenant to his land, ought to ſay for his beaſts *levant* and *couchant*, or otherwiſe it is not good; becauſe that in ſuch caſe he claims but part of the herbage, and the reſidue the

lord is to have; and then the commoner ought to say for his beasts *levant* and *couchant*, for this is the standard of the profit he is to have, *viz.* herbage for all his beasts that shall be *levant* and *couchant* upon his land, and not for any more; and therefore, if he put in any beasts that are not *levant* and *couchant*, he does wrong to the lord, and shall be punished as a trespasser for them. 2 *Saund.* 325. 326. Hoskins and Robins's case. *Noy Rep.* 145. Jeffreys and Boyes's case. PASTURE. The reason why they must be levant and couchant.

If a man claim common by prescription for all beasts commonable, in the land of another, as appurtenant to a tenement, this is a void prescription: because he does not say it is for beasts *levant* and *couchant* on the land, to which he claims this to be appurtenant; for a man may not have common, without number, appurtenant to land: and when he claims the common for all beasts commonable, and doth not say for beasts *levant* and *couchant* upon the tenement; this shall be intended to be common sans number, according to the words: for there is not any thing to limit it, when he does not say for beasts *levant* and *couchant*. *Pasc.* 16 *Car. in B. R.* Cobham and White's case. 1 *Roll. Abr.* 398. Prescription.

But where common is claimed by the name of pasturage, there needs no averment, that they were *levant* and *couchant*. See below, tit. *Prescription. Cro. Jac.* 27. Sir J. Thorndle's case.

He that hath common appurtenant may not *agist* the beasts of a stranger: and he which claims common for beasts *levant* and *couchant*, may not give licence to a stranger to put in his beasts, for that would be a wrong to the lord or owner of the soil by a surcharger of common: and Monk and Butler's case is, where one who had common for 20 beasts certain, may not license another to put in the same number; and much more where they have for no certain number. *Cro. Jac.* 574. Monk and Butler's case. Not with the beasts of a stranger. Licence.

But he which hath common appurtenant may borrow or hire the sheep of another to compasture the land, (but not to sell them) and may use this with his beasts that are for his stall. 14 *H.* 6. 6.

The plaintiff replies to justify damage feasant in trespass by a gelding, that he is seised of a messuage and land in &c. and that he and all those whose estate, &c. have had common *pro* 25 *magnis averiis* every year after May-day, Magna averia.

PASTURE. &c. This plea is good, for *magna averia* may well be intended horſes, oxen, kine, or other ſuch beaſts of thoſe kinds which are commonable, and ſuch which by the common phraſe of the people are well enough known amongſt them. *Cro. Jac.* 580. Standred and Shoreditch's caſe.

Upon a ſpecial verdict in ejectment the queſtion was, whether or not a preſcription for common of paſture, for all cattle and ſwine in a foreſt at all times of the year, were a good preſcription or not? The preſcription is naught. *Hard.* p. 87.

And as for the apportionment or ſuſpenſion thereof ſee *poſt.*

III. COMMON IN GROSS.

1. *The Nature of Common in Groſs.*
2. *How, and with what and whoſe Beaſts it may be uſed.*
3. *The Commencement of Common in Groſs, and how it may be made at this Day, and how it may be granted over.*

Nature. COMMON in groſs, or at large, is ſuch as is neither appendant nor appurtenant to land, but is annexed to a man's perſon, being granted to him, and his heirs, for life, or for years, by deed, or being ſo claimed by preſcription. 2 *Blac. Com.* 34. *Co. Lit.* 121, 122. *a.* 2 *Inſt.* 477. *Roll. Ab.* 402. *Fit. N. B.* 4 *Rep.* 30.

I ſhall ſet down what ſhall be ſaid common in groſs, or not, in certain caſes.

If a grant is for beaſts *levant* and *couchant*, this cannot be intended common in groſs, but appurtenant. Therefore, if *A.* grant common to *B.* in certain land for all his beaſts, which ſhall be *levant* and *couchant* upon *B.* Acre, where *B.* had nothing in Black Acre, ſo that this may not be appurtenant; yet this ſhall not be a common in groſs, becauſe the intention of the grant is for beaſts *levant* and *couchant*. And ſo if *A.* grant to *B.* common in certain land for all his beaſts, which ſhall be manuring and depaſturing in *B.* Acre, where *B.* had nothing in *B.*

Acre, becauſe this cannot take effect as a common appurtenant, yet it ſhall not take effect as a common in groſs, inaſmuch as it is limited to ſuch beaſts as ſhall manure and depaſture the land. See more below. 1 *Roll's Abr.* 403. Gawen and Stacy's caſe. PASTURE.

Now obſerve with my lord *Coke* (*Com. Littleton* 122.) Some common is certain, viz. for a certain number of beaſts; ſome common is certain by conſequence, viz. for ſuch which are *levant* and *couchant* upon the land; and ſome more uncertain, as common without number in groſs. Diverſities of certainty as to common.

But note, that though it is called common in groſs and ſans number; yet if you preſcribe for common without number appurtenant to land, you can put in no more cattle than what is proportionable to your land; for the land ſtints you in that caſe to a reaſonable number; but if you preſcribe for common without number in groſs, there is no bounds But if the owner grant common without number, yet the grantee may not uſe the common with ſo many beaſts as that the grantor may not have ſufficient for his beaſts. Differences between common in groſs, and common without number in groſs.

A man may preſcribe for common in groſs, without ſaying *levant* and *couchant*; but not ſo for common appendant. For a man cannot have common without number appurtenant to land, but appendant. *Mod. Rep.* 74. Preſcription for common in groſs.

When a man claims common for all beaſts commonable, and does not ſay for beaſts *levant* and *couchant* upon the tenement; this ſhall be intended to be common without number: and therefore, if a man claim common by preſcription for all beaſts commonable in the land of another, as appertaining to his tenement, this is a void preſcription, becauſe it is not ſaid, it is for beaſts *levant* and *couchant* in the land to which he claims this to be appurtenant; for a man cannot have common without number, appurtenant to land: and when he claims common for all beaſts commonable, and ſaith not for beaſts *levant* and *couchant* upon the tenement, this ſhall be intended to be common without number, according to the words; for (as was before obſerved) there is not any thing to limit it, when it does not ſay for beaſts *levant* and *couchant*. 1 *Roll's Abr.* 398. Cobbay and White's caſe. What ſhall be intended common in groſs. Preſcription.

If a man had common ſans number, yet he ought not ſo to ſurcharge the ſoil, but that the lord may have com-

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mon there alſo; and if the tenant ſurcharge the ſoil, where he had common without number, the lord may diſtrain him, but admeaſurement lies not. 2 *Saund.* 345. *ibid.*

Common without number cannot be appendant to any thing but lands; and it is called common without number, becauſe it is only for beaſts *levant* and *couchant*; and it is uncertain how many thoſe are, there being more in ſome years than in other. But it is a common in its nature, for that is certain which may be made ſo. *Hard.* 118. Chichly's caſe.

As for the granting of common in groſs and without number, and how it ſhall paſs, and with what words; ſee *poſt.* tit. *Grant, and Expoſition of Grants.*

2. *How, and with what, and whoſe Beaſts it may be uſed.*

With the beaſts of a ſtranger.

He which hath common in groſs for a certain number of beaſts, may put in the beaſts of a ſtranger, and uſe the common with them. 11 *H.* 6. 22. *b.*

He may hire other beaſts to manure his land, and uſe the common with them; for they are in a manner his beaſts for the time; and I ſee no reaſon, but he may agiſt other beaſts, though 45 Ed. 3. 25, ſeems to be againſt it.

For all manner of beaſts.

A man may preſcribe to have common in groſs for all manner of beaſts, or the grantee may have it for a certain number of beaſts.

3. *The Commencement of Common in Groſs, and how it may be made at this Day, or granted over or not.*

It has been before ſaid, that it may commence either by preſcription or grant. See *Cro. Car.* 219.

Common appendant, and common appurtenant may not be made in groſs, and the reaſon.

Common appendant cannot be made common in groſs, for that is for beaſts *levant* and *couchant* upon the land to which the common is appendant, and therefore it may not be ſevered without extinguiſhment. And common appurtenant for beaſts *levant* and *couchant* upon the land may not be made in groſs, for the ſame reaſon; and if the intention of the grant is, that the beaſts ſhall be *levant* and *couchant*, it ſhall not be a common in groſs. 9 *Ed.* 4. 39. *Plowd. Com.* Nevill's caſe, 384. *Paſc.* 2 *Jac.* 13. Drury and Rant's caſe.

If *A.* and all thoſe whoſe eſtate he hath in the manor of *D.* have had time out of memory a fold-courſe, viz. common of paſture for any number of beaſts not exceeding

300, in a certain field appurtenant to the ſaid manor; he may grant over this fold-courſe to another, and ſo make it in groſs; becauſe the common is for a number certain, and by the preſcription the ſheep are not to be *levant* and *couchant* upon the manor; but it is a common for ſo many ſheep appertaining to the manor, which may be ſevered from the manor as well as an advowſon, without any prejudice to the owner of the land where the common is to be taken. *M.* 11 *Car. B. R.* Day and Spooner's Caſe in *Cro. Car.*

See more tit, *Grant.*

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Grant over.

IV. COMMON PUR CAUSE DE VICINAGE.

1. *The Nature and Original of it. What ſhall be common pur Cauſe de Vicinage, and what Perſons ſhall have it, how Title ſhall be made to it, and how uſed.*
2. *Of Encloſure of the Land, and the Conſequences.*

1. *The Nature and Origin of it.*

COMMON, becauſe of vicinage, or neighbourhood, is where the inhabitants of two townſhips lying contiguous to each other, (or, as is ſometimes the caſe, two manors in one vill), have uſually intercommoned with one another; the beaſts of the one ſtraying mutually into the other's fields without moleſtation from either. 2 *Bluc. Com.* 33. 2 *Bulſt.* 87. and ſee 7 *Co.* 5. 8 *Rep.* 78.

Common pur-cauſe de vicinage.

This is indeed only a permiſſive right intended to excuſe what in ſtrictneſs is a treſpaſs in both, and to prevent a multiplicity of ſuits; and therefore either townſhip may encloſe and bar out the other, though they may have intercommoned time out of mind. *Ib. d. Co. Lit.* 122. *d.* 4 *Co.* 38. *Roll. Abr.* 399.

And as the original cauſe of this ſpecies of common was but to prevent ſuits for reciprocal eſcapes from the fields of one town into the other, if there be common *pur cauſe*, &c, between one pariſh having 50 acres of common, and another having 100, the inhabitants having the 50 acres of common, cannot put into the other more than a proper number of cattle for the depaſturing of 50 acres. 7 *Co.* 5. *b.*

PASTURE. Every common *pur cauſe de vicinage*, is common appendant; and therefore need not, like common appurtenant, be preſcribed for: but it is ſufficient to ſay that he and thoſe whoſe eſtate he has, have been uſed ſo to intercommon. *Roll. Ab.* 339, *Poph.* 201. *Latch.* 161. 3 *Keb.* 388.

But this ſort of common differs from the other; for no man can put his beaſt therein, but they muſt eſcape thither of themſelves by reaſon of vicinity, in which caſe one may incloſe againſt the other; becauſe, as it is ſaid before, it is but an excuſe for treſpaſs: and ſo is *Dyer*, 316. One may not put their beaſts into the land of the other, for then thoſe of the other vill may diſtrain them damage-feaſant, or have an action of treſpaſs; but they ought to ſtray out of their own fields. *Co. Lit.* 122. *a.* 8 *Rep.* 78, 79. Wyat and Wild's caſe.

One may incloſe againſt the other.

If one had land in another town, and common there with the inhabitants, &c. this is common by cauſe of vicinage. *Dyer* 47, *Pl.* 13.

But if there are three vills, *A. B.* and *C.* and *B.* is in the middle between them; the vills of *A.* and *C.* may not intercommon for cauſe of vicinage. *Dyer* 47. *Pl.* 14.

If there are two manors in one vill, they may intercommon for vicinage; and this is uſual. 2 *Bulſt.* 87.

Every common for cauſe of vicinage, is common appendant. And therefore, a man need not preſcribe in a common for cauſe of vicinage; but it is ſufficient to ſay, that he and all thoſe whoſe eſtate, &c. have uſed to intercommon by cauſe of vicinage. See below. And 13 *H.* 7. 13. *b.* 1 *Roll. Abr.* 399. *K.* 6.

Not to be preſcribed for.

2. *Of Incloſure of the Land in which is common* pur Cauſe *of* Vicinage, *and the Conſequence.*

One town may incloſe againſt the other; for this ſort of common is, as has been before ſaid, but an excuſe for treſpaſs *Co. Lit.* 122, 1 *Keb.* 24.

By incloſure the common is gone

If the lord incloſe any part of his common, the common for cauſe of vicinage is gone; for when the reaſon ceaſes, the conſequences ceaſe alſo. 1 *Roll. Abr.* 399.

But not as to a copyholder.

If there is common for cauſe of vicinage between two manors, and the lord of one manor incloſe; this ſhall not bind a copyholder of the ſame manor, but that he may have common for cauſe of vicinage, as he had before. 1 *Roll. Abr.* 399. *K.* 2.

CHAP. III.

OF COMMON OF ESTOVERS.

1. *The Nature of.*
2. *Who entitled to.*
3. *Whether and to what Purpoſes Eſtovers continue upon falling down of, or new Additions to the Meſſuage.*
4. *Remedy of the Commoner for Loſs of Eſtovers.*

1. *The Nature of Common of Eſtovers.*

Nature.

COMMON of eſtovers, or eſtouviers (from *eſtoffer* to furniſh,) is a liberty of taking neceſſary wood for the uſe or furniture of a houſe or farm from off another's eſtate. *Co. Lit.* 41. *b.* 2 *Black. Com.* 35.

The Saxon word *bote* is uſed by us as ſynonymous to the French *eſtovers*; and theſe eſtovers, as we have before ſeen, are *houſe* or *fire-bote*, which is a reaſonable and ſufficient allowance of wood to repair or burn in the houſe; *plough bote* and *cart-bote*, or wood to be employed in making and repairing all inſtruments of huſbandry; and *hay* or *hedge bote*, which is wood for repairing of hays, hedges, or fences. 2 *Blac. Com.* 35.

2. *Who entitled to this Common.*

What eſtovers of common right belong to tenant for life or years.

And all theſe the law gives to tenant for life, without proviſion of the party; and the ſame eſtovers tenant for life may have, tenant for years ſhall have; but he muſt be careful not to take more than may be needful, or he will be puniſhable for waſte. And theſe the leſſee may take upon the land without any aſſignment, unleſs he be reſtrained by ſpecial covenant. *Terms de Ley.*

And if he ſell the wood, or uſe it for any other purpoſe than he ought, action of treſpaſs will lie againſt him. *Fitz. N. B.* 58. 159. 9 *Rep.* 113. 1 *Inſt.* 41, 46.

On the other hand, if the owner of the ſoil cut down all the wood, ſo that none remain for the tenant's eſtovers, the tenant if for life may have an aſſize of eſtovers, and if for years or at will an action on the caſe, but he cannot take any part which is cut. *Moor.* 65. 9 *Rep.* 112. *Roll. Ab.* 406. 108. *Pl.* 225. 67. *Pl.* 3 *Keb.* 43. 5 *Co.* 25. *Cro. Eliz.* 826. *Cro. Jac.* 257. *Yelv.* 188. *Brownl.* 197. 220. *Bulſt.* 93. 94. *F. N. B.* 58.

Estovers.

Preſcription for eſtovers to build new houſes.

Preſcription for eſtovers to repair or build new houſes, is good; and therefore in treſpaſs for cutting down of trees, &c. the defendant juſtifies by preſcription to have eſtovers; for that, he was ſeiſed in fee of ſuch an houſe and land, and preſcribed to have eſtovers for repairing the ſaid houſes, or for the building of new on the ſaid land, and juſtifies, &c. *Per cur' præter* Williams, it was held good; for one may grant ſuch eſtovers at this day, and by the ſame reaſon there may be a preſcription for them. But by Williams, it ought to be reaſonable, which is to repair ancient houſes, but not to build new ones, for then he may cut down all the wood and deſtroy it, which ſeems to be a good reaſon. But it was adjudged againſt his opinion. *Cro. Jac.* 25. Counteſs of Arundel againſt Steere.

Eſtovers reaſonable.

Action on the caſe.

There is a remarkable diverſity in Dowglas and Kendal's caſe, reported and agreed by ſeveral Reporters. It is where a man claims reaſonable eſtovers in another's ſoil, and where he claims all the thorns or trees in another's ſoil; in the firſt caſe, if the owner of the ſoil cut down all the thorns firſt, he who had common of eſtovers cannot take them, for the property and intereſt of all the thorns continues in the owner of the ſoil, and the other had nothing but common there; and in ſuch caſe, he who had title of eſtovers ſhall have an action on the caſe; otherwiſe where a man claims all thorns; there the lord may not cut down thorns, nor licenſe any other to cut them down, becauſe the defendant preſcribes to have all the thorns growing on that place; and this preſcription excluded the lord to take any thorns there. *Yelv.* 187. *Cro. Jac.* 25. 1 *Bulſt.* 94. 1 *Brownl.* 219. Dowglas and Kendal's caſe.

Eſtovers appurtenant.

If a man grant to leſſee for years, that he ſhall have ſo many eſtovers as ſhall ſerve to repair his houſe, or that he ſhall burn within his houſe, &c. during the term: this is appurtenant to the land, and ſhall run with it as appurtenant to the land into whoſe hands ſoever it ſhall come. 5 *Rep.* 17. in Spencer's caſe, cited in Dean and Chapter of Windſor's caſe.

The nature of common appurtenant

So in Plowden 381. If one grant eſtovers to another, to be burnt in ſuch an houſe, it is appurtenant to the houſe, and is inſeparably incident to it. And ſo common granted in ſuch a place to one for his beaſts *levant* and *couchant* in his farm of Dale, the common is made appurtenant to this: ſo that he who had the houſe, by what-

ſoever title he comes to it after, he ſhall have the eſto- ESTOVERS.
vers; and he who after ſhall come to the farm ſhall have common; and the eſtovers may not be ſevered from the houſe, nor the common from the farm, unleſs by extinguiſhment; for if he who hath the houſe will grant the eſtovers to another, reſerving to him the houſe, or the houſe to another, reſerving to him the eſtovers, the eſtovers ſhall not be ſeparated from the houſe by this, becauſe they are to be expended in the ſame houſe. *Plowd.* 381. Sir Henry Nevill's caſe.

Eſtovers not to be ſeparated.

If the leſſor grant fire-bote expreſsly in his leaſe, the leſſee may take trees if there be no under-wood. 3 *Leon.* 16.

A leaſe is made of a houſe and wood wherein it is covenanted, that the leſſee ſhall have houſe-bote and fire-bote; by this it is implied and meant, that he ſhall not have any of the woods to uſe or convert to any other purpoſe, but that they do belong to the leſſor; and if the leſſee uſes them to any other purpoſe, the leſſor ſhall have help in chancery, and he may cut the woods, leaving to the leſſee ſufficient for houſe-bote and fire-bote. *Terms de Ley* 50.

Grant of eſtovers.

3. *Whether* eſtovers *continue, if the Meſſuage be altered or fall.*

If a man had eſtovers, either by grant or preſcription to his houſe, he may alter the rooms, and not deſtroy his preſcription. So if he make new additions to the old houſe, and build new chimneys, provided he build none of the chimneys on the part newly added. 4 *Rep.* 87. Lutterell's caſe. 4 *Leon.* 383.

So, if an houſe happen to decay, a new one may be erected on the ſame place, and not deſtroy the eſtovers appertaining thereto; and common of eſtovers appendant to an houſe, is not loſt by the falling down of the houſe, but revived by the re-edifying; in Brier and Lake's caſe. 4 *Hob.* 39, 40.

Eſtovers revived by re-edifying.

If an ancient cottage is erected in the place where the old cottage ſtood; this is no new cottage, but it may claim common as an ancient cottage by preſcription. But yet, when the houſe is down he can claim no eſtovers; and if he ſue for it, and the other plead, that his houſe is down, he ſhall not have judgment with a *ceſſet executio*, till his houſe be re-edified; for at the time of

Suſpended by the falling down of the houſe.

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But if the houſe be built in another place or form the eſtovers are gone. *Fit. N. B.* 180. Or where the alterations to an houſe are ſuch as to prejudice the tertenant, or owner of the land or wood, the eſtovers will be loſt. *Fit. N. B.* 180.

Not by grubbing up the wood. Common of eſtovers is not loſt by grubbing up the wood; but ſtill an aſſize will lie. *Hob.* 43. *Dyer* 363.

The wood not to be converted to other uſes. A. has common of eſtovers in the wood of B. i. e. for houſe-bote, and he cuts down four trees to repair, and in the working they prove unfit for that uſe; as for poſts of an houſe, &c. The tenant cannot convert this timber to any other uſe, as to cooper-ware, &c. neither can they ſell them and buy other fit wood with the money; neither can he enlarge the houſe with this timber, nor board the ſides of a barn therewith, which had mud-walls, or the like, before. Per Berkley at York Aſſizes. *Clayt. Rep.* 47. Earl of Pembroke's caſe.

Alſo it is ſaid, if one have eſtovers in certain in 10 acres of wood, and five of thoſe acres deſcend to him, he ſhall have the whole eſtovers out of the reſidue. *Vide critica juris ingenioſa*, p. 123.

4. *Remedy of Commons for Loſs of Eſtovers.*

Action on the caſe againſt owner of the ſoil, if he cut down all the trees. Where a man claims common of eſtovers in another's ſoil, if the owner of the ſoil cuts down all the thorns or trees firſt, he who had common of eſtovers cannot take them away; for the property and intereſt of all the thorns continues in the owner of the ſoil, and the other had nothing but the common there. But he who had common there in ſuch a caſe, ſhall have an action on the caſe. See above. *Yelv.* 187. *Cro. Jac.* 256. Dowglaſs and Kendall's caſe.

If the commoner had an eſtate for life he ſhall have an aſſize; if but a term for years, he ſhall have action on the caſe. So action on the caſe lies by a tenant for years of an houſe, to which eſtovers are appurtenant, or to take brakes. 1 *Roll. Abr.* 406. Spilman's caſe, 9 *Rep.* 112. *b.*

TURBARY.

A man has common of eſtovers, ſo many loads per annum certain, or incertain ſo many as he ſhall ſpend in his houſe; if I ſtub up this wood, ſo as there neither is, nor will be wood again; yet he ſhall have an aſſize from year to year; and judgment ſhall be to recover ſeiſin and damages. 9 *Rep.* 112. *b.* *Hob.* p. 43.

Aſſize lies, though the wood be grubbed up, and the judgment in it.

The ſtatute of 22 Ed. 4. and 35 H. 8. ch. 7. give power to ſubjects to incloſe woods; yet the commoner ſhall have common. See the ſtat. of 35 *H.* 8. *ch.* 17. 8 *Rep.* Sir Francis Barrington's caſe.

Commoner ſhall have common, notwithſtanding incloſure of woods.

If I have eſtovers in land, and cut down the eſtovers, and a ſtranger takes them away; I ſhall have an action againſt him, though he has common of eſtovers there alſo. 1 *Brownl.* 44.

An action againſt a ſtranger.

If a leaſe be made of an houſe and eſtovers, if the leſſor deſtroy all the wood, out of which the eſtovers are to be taken, the leſſee ſhall have an action againſt the leſſor. 1 *Saund.* 322.

Action of covenant againſt the leſſor.

CHAP. IV.

OF COMMON OF TURBARY, AND PISCARY.

1. *The Nature of Common of Turbary, and how Title ſhall be made to it.*
2. *Of Common of Piſcary, the Nature thereof,* &c.

1. *Of Common of Turbary.*

COMMON of turbary is a liberty of digging turf upon another's ground, or upon the lord's waſte. *Co. Lit.* 4. 122. *a.* 4 *Rep.* 37.

To what it ſhall be appendant.

Common of turbary is of the ſame nature of *eſtovers ardendi*; and may not be appendant to land, but to an houſe; for the appendancy muſt follow the nature of the thing to which it is appendant; and turf can only be uſed in an houſe. 4 *Rep.* 37. *a.* Tirringham's caſe. 5 *Aſſ.* 9.

It may, however, be in groſs. 4 *Co.* 37. *Co. Lit.* 4. 122. *a.*

Though it cannot in any caſe exclude the owner of ſoil. *Ibid.* Unleſs preſcribed for. *Lev.* 234. *Sid.* 354. 2 *Keb.* 290. And ſee 9 *Co.* 48.

PISCARY. There may likewiſe be a common or liberty of digging for coals, and minerals, ſtones, and the like, in the lord's ſoil. 2 *Blac. Com.* 34. *Co. Lit.* 122. *a.* 41. *b. Blac. Rep.* 926.

Note, where turbary is granted to a houſe, it ſhall paſs by a grant of the houſe, *cum pertinentiis*: ſee for this the caſe of Solme *v.* Bullock, *Hil.* 31, 32 *Car.* 2. in *C. B.* where treſpaſs was brought for digging turfs in his ſoil, the defendant juſtifies by a grant of the former lord of the manor to *J. S.* for digging turfs there, to *J. S.* and his heirs, to be burnt in ſuch a houſe, and ſhews, that *J. S.* granted the houſe *cum pertinentiis* to the defendant and his heirs; and on long and ſpecial pleadings, the queſtion was, whether the turbary ſhould paſs by the words *cum pertinentiis*, without being ſpecially named? And 2 *Cro.* 179, 180. Brandly *verſ.* Brook was cited that it ſhould not paſs. But held by the whole court, that it did paſs; for as common appurtenant may at this day be granted, ſo it may paſs by the word appurtenances, either to houſe or land, according as the nature of the thing is. *Vide* 3 *Lev.* 165.

2. *Common of Piſcary.*

Common of piſcary is a liberty of fiſhing in another man's water. *Co. Lit.* 122. *a.* (*a*).

(*a*) A common of piſcary differs alſo from a free piſcary, mentioned 2 *Blac. Com.* 39, in that the free fiſhery is an excluſive right, the common of piſcary is not ſo; and therefore, in a free fiſhery, a man has a property in the fiſh before they are caught; in a common of piſcary not till afterwards. Some indeed have conſidered a free fiſhery not as a royal franchiſe, but merely as a private grant of a liberty to fiſh in the ſeveral fiſhery of the grantor. But to conſider ſuch right as originally a flower of the prerogative till reſtrained by *magna charta*, and derived by royal grant (previous to the reign of Richard I.) to ſuch as now claim it by preſcription, and to diſtinguiſh it (as we have done) from a ſeveral and a common of fiſhery, may remove ſome difficulties in reſpect to this matter, with which our books are embarraſſed. For it muſt be acknowledged, that the rights and diſtinctions of the three ſpecies of fiſhery are very much confounded in our

But common of piſcary, ſo as to exclude the owner of the ſoil, is contrary to law. 1 *Inſt.* 4. 122. *a.* 164. 5 *Rep.* 34. And ſee 1 *Inſt.* 122. *a. n.* (7). PISCARY.

Unleſs where a perſon has *ſeparalem piſchariam* by preſcription, in which caſe the owner of the ſoil will be excluded. *Co. Lit.* 122. *a.* 8 *Co.* 98. *Vent.* 391. *Sand.* 251. 326. And ſee *Hard.* 407.

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law-books; and that there are not wanting reſpectable authorities which maintain, that a ſeveral fiſhery may exiſt diſtinct from the property of the ſoil, and that a free fiſhery implies no excluſive right, but is ſynonymous with common of piſcary. 2 *Blac. Com.* 40. And ſee *Co. Lit.* 122 *a. n.* (7).

Theſe ſeveral ſpecies of common bear a reſemblance to common of paſture in many reſpects, though in one point they go much farther; common of paſture being only a right of feeding on the herbage and verdure of the ſoil, which renews annually; but common of turbary and thoſe juſt mentioned, are a right of carrying away the very ſoil itſelf. 2 *Blac. Com.* 34.

And, moreover, they all originally reſult from the ſame neceſſity as common of paſture; viz. for the maintenance and carrying on of huſbandry; common of piſcary being given for the ſuſtenance of the tenant's family; common of turbary, and fire-bote, for his fuel; and houſe-bote, plough-bote, cart-bote, and hedge-bote, for repairing his houſe, his inſtruments of tillage, and the neceſſary fences of his grounds. 2 *Blac. Com.* 35.

CHAP. V.

OF THE POWERS AND PRIVILEGES OF COMMONERS.

1. *In reſpect to the Common or Soil.*
2. *In reference to the Lord.*
3. *In reference to Strangers.*

The Powers and Privileges of Commoners in reſpect to the Soil.

AS to what he may do in reference to the common and his fellow-commoners, you muſt remember what I treated of before concerning the nature of common, and what intereſt he hath in the ſoil; which is no more than to put in his cattle; neither is it properly his common till his beaſts have fed there; and though he hath common there, yet he cannot meddle with the land, nor with the graſs, other than by the feeding of the cattle, for he hath but a partial or relative intereſt; that is, though he hath no intereſt in the ſoil, yet he hath intereſt in the profit of it; and therefore he may diſtrain beaſts damage-feaſant, becauſe that is a damage to the commoner; or have his action on the caſe. 2 *Leon.* 201.

He may diſtrain damage-feaſant.

A commoner may not do any thing upon the ſoil, though it tends to the melioration or improvement of the common; as cutting down of buſhes, fern, &c. And therefore, if a common be every year in the winter ſurrounded with water, the commoner may not make a trench in the ſoil to avoid the water; for he has nothing to do with the ſoil, but only to take the feed with the mouths of his cattle. And ſo it was adjudged in Howard and Spencer's caſe, 17 *Car.* 2. *B. R.* A commoner may not cut mole-hills or buſhes, nor make fiſhponds, though theſe acts are for improvement. But perhaps, if commoners have uſed to dig and ſcour trenches time out of mind, then they may do it, as is uſed in the moors of Somerſet: otherwiſe, if he fill a trench in the common which was dug by the lord, the lord ſhall have treſpaſs againſt him. 12 *H.* 8. 2. 13 *H.* 8. 15. *Sidetf.* 251, 10 *H.* 7. 15.

May not alter the ſoil, though it be to the melioration of the common.

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There is a difference, where the commoner intermeddles with the ſoil *de novo*, and where he reforms a miſfeaſance; he may do the laſt but not the firſt; and it is ſaid in *Godbolt's Rep.* p. 182. That it was holden by the whole Court, that though a commoner cannot generally juſtify the cutting and taking away buſhes from off the common, yet by a ſpecial preſcription he may; ſo he may ſay, that the commoners have uſed time out of mind to dig the land to let out the water, that he may the better take the common with his cattle. 2 *Bulſt.* 116. *Godb.* 182.

Yet he may reform a miſfeaſance.

And ſo, though he is debarred from doing thoſe things which imply an ownerſhip over the ſoil, yet he ſhall have ſuch remedies for any injury done to his right of common as are commenſurate with his intereſt. *Godb.* 123. He may therefore (as will be hereafter ſhewn) diſtrain beaſts damage-feaſant. He may alſo bring an action on the caſe, and in ſome caſes maintain an aſſize *(a)* for any injury ſuſtained. *Roll. Ab.* 404.

The commoner may throw down a gate or an hedge, which hinders him from coming to his common, *Roll. Ab.* 406. 2 *Inſt.* 88.

A commoner may juſtify his coming upon the land, to view if the paſture in it be fit to receive his beaſts. *Pl.* 17 *Jac.* B. Spilman's caſe.

Come upon the land to view the paſture.

If a tenant of the freehold ploughs it and ſows it with corn, the commoner may put in his cattle, and therewith eat the corn growing upon the land: ſo if he or a commoner lets his corn lie in the field beyond the time uſual, the other commoners may notwithſtanding put in their beaſts. 2 *Leon.* 202, 203.

May eat the corn.

Every commoner may break the common if it be enclоſed, although he does not put in his cattle immediately, and his title of common ſhall excuſe him of treſpaſs. *Lit. Rep.* 38. Hambleton's caſe.

He may break open inclоſures.

But if the right of the commoner be only abridged by ſuch incloſure, or other act of the lord, and not wholly

(a). But not being owner of the ſoil, he cannot ſupport an action of treſpaſs. 4 *Mod.* 187. 2 *Salk.* 637. 9 *Geo.* 3. *b.*

PASTURE. deſtroyed, he cannot thus aſſert his right by any act of his own, but muſt reſort to an action on the caſe, or by an aſſize. Cooper v. Marſhall. 2 *Wilſ.* 51. 1 *Bur.* 259. Sadgrove v. Kirby. 6 *Term Rep.* 483.

2. *What Acts or Things a Commoner may do, or not do, in reference to the Lord.*

Action on the caſe for ſurcharging. If the lord ſurcharge the common, the commoner may not chaſe the beaſts; but ſhall have an action on the caſe, which is a ſufficient remedy. But the beaſts of a ſtranger he may diſtrain damage feaſant, or chaſe them out of the common; for a ſtranger had no colour to have his beaſts there. *Godb.* 182.

Surcharge. If the lord ſurcharge the common with conies, the commoner in treſpaſs cannot juſtify his entry, to chaſe and kill them; for a commoner cannot be his own judge, for he has his action on the caſe: and though the owner of the ſoil had no property in the conies, yet ſo long as they are on his land he has poſſeſſion of them, which is good againſt the commoner. *Yelv.* 104. 2 *Leon.* 201, 202. Hodeſdon and Gyſel's caſe. 1 *Brownl.* 208. the ſame caſe. *Cro. Jac.* 195. the ſame caſe. *Bridg.* 16. Sambon and Harrilo.

No admeaſurement. If the lord ſurcharge the common, the commoner ſhall have an aſſize or action on the caſe, not admeaſurement. *Fit.* 125. *a.* 4 T. R. 71.

If the lord make a pond on the common, if the commoner have common ſufficient left, it is good: but if all the common be taken up in a pond, he may let out the water, and ſo enjoy the common. 2 *Eulſt.* 116. Carill and Pack's caſe.

Lord excluded. The tenants of a manor may preſcribe to have the ſole common for their horſes in a meadow after the graſs is cut and made into graſs-cocks, to bind or keep their horſes there, ſo that they do not meddle with the hay till Lammas-day, and after Lammas-day for all commonable beaſts, *levant* and *couchant* upon their tenements at large, without tying, till Lady-day in Lent yearly, as to their tenement appertaining, excluding the lord of the meadow and manor, to have any common or paſture there for the time, he having the ſoil of the meadow the whole year, and the ſole herbage until Lammas, or ſhare until

the cutting, if he will keep it for hay. 2 *Roll's Abr.* 267. Wheatland and Sir Robert Pain's caſe. PASTURE.

The lord may be ſtinted in his own ſoil, and then if the lord put in more, the commoner may diſtrain them damage-feaſant. And by Fenner, Williams and Crook, ſuch taking is good: for by the cuſtom the lord is excluded to have but his ſtint, and the lord may be well ſtinted, and all the veſture and benefit of the ſoil is to the commoners, and they have no other remedy. And by all the Juſtices, where the cuſtom is to diſtrain the lord's beaſts, it is good. *Cro. Jac.* 208. *Yelv* 129. Kenrick and Pargeter's caſe. 2 *Brownl.* 60. 6 *Jac.*

Diſtrain the beaſts of the lord damage-feaſant on a ſurcharge.

The lord may be ſtinted.

But in Trulock's caſe, 14 *Car.* this caſe was adjudged; which was, there was a cuſtom, that a cloſe ought to lie freſh and hain every ſecond year until Lady-day, after the corn cut and carried away, and *J. S.* had uſed, time out of memory, to have common in the ſaid cloſe, after Lady-day till it was re-ſown with corn, for his beaſts *levant* and *couchant* upon a certain tenement, as appurtenant to it; in this caſe, if the lord of the ſoil of the ſaid cloſe put in his beaſts into the ſaid cloſe againſt the cuſtom, when it ought to lie freſh and hain by the cuſtom, *J. S.* though he be but a commoner, may take the beaſts of the lord damage-feaſant; for it would be the worſe for the common, if the lord ſhould feed the graſs before the common is to be taken. 1 *Roll's Abr.* 405, 406. Trulock and White's caſe.

Diſtreſs.

If the owner of the ſoil ploweth the land, and ſow the land; yet the commoner may put in his cattle, claiming the common; and he may well juſtify the ſame, becauſe the wrong begins in the owner of the ſoil. 2 *Leon.* 201.

Commoners may eat up the lord's corn.

One grants common in ſuch a place where, &c. by this the grantee may uſe all the common; and if the grantor erect a ſtack of hay upon part of the place where, &c. and the commoners beaſts eat the hay, it is juſtifiable, and the grantor cannot chaſe the beaſts; for otherwiſe, by ſuch means he may defeat his own grant; and by the ſame reaſon that he may erect one ſtack, he may erect twenty. 20 *Yelv.* p. 201. Fermor and Hunt's caſe. 1 *Bulſt.* 220. ſame caſe.

Or hay in a ſtack on the common.

No man can defeat his own grant.

The lord may not dig pits in the common; for the ſtatute ſaith, other manner of improvement, viz. by incloſure. And a commoner may bring an action on the caſe; as this was, for digging of pits and ſpreading of gravel, by which he loſt his common. The defendant

An action on the caſe for digging of pits.

PASTURE.

Plea amounting to the general iſſue.

pleaded, he is lord of the ſoil, and that he digged for coals; making as little damage to the paſture as might be, and averring that he had left ſufficient common. And the plaintiff demurs, and ſhews for cauſe; that this plea amounts to the general iſſue. And of that opinion was the Court: 2 *Cro.* 165. 1 *Sid.* p. 106. Goe and Cotber's caſe.

Whether right of common is rateable to the poor.

A corporation having lands uſed as a common of paſture, and ſtocked by ſuch reſident burgeſſes as think fit, according to a certain annual ſtint, fixed by a leet-jury; and for which the burgeſſes, who ſtock the common, pay 19s. 4d. per annum to each of thoſe who do not: Held; that certain reſident burgeſſes, having ſuch right to ſtock, and ſtocking the land for a certain year, were occupiers of the land as tenants in common, and were therefore rateable to the poor's rate, in reſpect thereof. *Quere*— Whether a mere right of common in groſs is rateable? The King *v.* Watſon, 2 *Smith's Rep.* 145.

What Things a Commoner may do, or not do, in reference to a Stranger.

Diſtrain damage-feaſant.

The Commoner may diſtrain the cattle of a ſtranger damage-feaſant in his own name; for the damage is to the commoner. But he cannot diſtrain the beaſts of the tenant of the land damage-feaſant. If any man feed in a common wrongfully, every commoner may have an action on the caſe againſt him; if the commoner hath a freehold, he ſhall have an aſſize; ſo if he has eſtovers, if a ſtranger cut them, he ſhall have aſſize; and if he has a term, he ſhall have an action on the caſe. But a commoner ſhall not have an action for every ſmall treſpaſs, but for ſuch whereby he had loſt his common; but the lord ſhall have an action for every treſpaſs. The commoner's cauſe of action muſt be by which means he loſt his profits. And the tenant of the ſoil may have an action of treſpaſs though it be ſmall. 15 *H.* 7. 2. 12. 9 *Rep.* 113. Maoy's caſe. *Hob.* 43. *Fitz. N. B.* 58.

An action on the caſe by every commoner.

An action on the caſe, for beaſts depaſturing on the common by every commoner.

Copyholder preſcribes, to have common in the waſte of the lord, and brings treſpaſs on the caſe againſt a ſtranger, for his beaſts depaſturing on the common there. The queſtion was, whether this action lies? For in 15 *H.* 7. 112. it is agreed, that a commoner cannot maintain an action of treſpaſs; nor any other than the owner

of the ſoil. 12 *H.* 8. 2. And the commoner has no right till he has taken it by the mouths of his beaſts; and the damage is to the tenant of the land, and then every other commoner may have an action; and ſo the ſtranger ſhall be infinitely prejudiced. Per Coke, if a commoner may diſtrain damage-feaſant (doing damage) it proves that he has wrong; then by the ſame reaſon, if the beaſts are gone before his coming, he may have an action on the caſe; otherwiſe, one that has many beaſts may deſtroy the common in a night; and it is not like a nuiſance, which may be puniſhed in a leet; but the other is private to the commoner, and cannot be puniſhed in another courſe. And he cited one Whiteband's caſe: many copyholders preſcribed to have the loppings and toppings of pollards, the lord cuts them; every copyholder may have his action: and alſo Hil. 5 *Jac. Rot.* 1427. George England's caſe. And Warburton was of the ſame opinion. 2 *Brownl. p.* 146. Crogate and Worms's caſe. PASTURE.

How the copyholders ſhall have an action for taking away of turfs off the common.

Copyholder uſeth to have common, and a ſtranger enters and takes turfs; although the copyholder had not damage by this, yet if the ſtranger enters with horſes and carts, and ſo impair the common, an action on the caſe lies. 1 *Rolle's Abr.* 89. *Mich.* 9 *Car.* in B. R. Terry and Goodyer's caſe.

A commoner cannot have an action of treſpaſs, but he may diſtrain damage-feaſant, and why.

Though the commoner cannot have an action of treſpaſs, by which he broke his ſoil, for that belongs to the owner of the ſoil; yet he may diſtrain damage-feaſant: and the reaſon is, becauſe he has received damage, and amends may be tendered to him in recompenſe of his damage. See *Plus.* tit. *Remedy*, 2 *Rolle's Abr.* 552. 9.

Agiſtment.

A commoner may not *agiſt* the cattle of a ſtranger. See tit. *Common in Groſs.* He which has common in groſs for a certain number of beaſts, may put in the beaſts of a ſtranger, and uſe the common with them. 2 *Leon. p.* 202. 11 *H.* 6. 22. *b.*

If a man claim common without number, or to have common for 20 beaſts, there he may *agiſt* other beaſts for money, in the common. Grantee for a certain number may not common with the beaſts of a ſtranger. *Fitzh. N. B.* 180. *b.* 18 *Ed.* 4. 14. *b.*

It was a doubt in Monk and Butler's caſe, *Cro. Jac.* 574, whether one who has commoning for 20 beaſts by grant, can licenſe another to feed there with ſuch a number of

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A commoner cannot licenſe without deed.

beaſts; becauſe it is for a certain number, and is as paſture, and not common, which ought to be taken by the mouths of the beaſts of the commoner? But they all agreed, that if he might licenſe, yet he cannot do it without deed. And ſo in Rumſey and Rawſon's caſe. *Raym.* 171.

Hiring.

If the commoner hire other beaſts to manure his land, he may uſe the common with them; but they are in a manner his beaſts by the hiring, and the beaſts which manure the land of right ought to have common. 45 *Ed.* 3. 25. 22 *Aſſ.* 84.

Where a commoner may kill conies, or not.

If *J. S.* had land adjoining to the land of *J. D.* in which land *J. N.* had common of paſture, and *J. S.* makes cony-burrows in his land, and ſtores them with conies, which come into the land of *J. D.* yet *J. N.* who had common of paſture may not kill them; becauſe he had nothing to do but to take the graſs with the mouth of his cattle; and in Everſley and Wilkinſon's caſe, ſuch a commoner cannot have an action on the caſe againſt *J. S.* who had ſtored the land with conies, without lawful grant or preſcription, whereby the conies came into the lands wherein he had common, by which he loſt his common, becauſe the commoner may not kill the conies. 1 *Roll. Abr.* 405. Bellew and Langden, and Everſley and Wilkinſon's caſe.

Where a commoner may diſtrain or not.

A commoner may juſtify the taking of the beaſts of a ſtranger, damage-feaſant upon the land. 3 *Ed.* 3. 27. 15 *H.* 7. 11.

In an action on the caſe, for putting of cattle upon the common; it was adjudged, that if the cattle of a ſtranger eſcape into the common, the commoner may diſtrain them damage-feaſant, as well as where the cattle are put into the common by a ſtranger. *Godbolt* 185. Morris's caſe.

If a man had common for 10 beaſts, and he puts in more, the ſurpluſage beyond the 10 may be taken damage-feaſant. 46 *Ed.* 3. 12. *b.*

If there be a ſhack common in a vill, where every one knows his part, but it lies in common; yet no commoner may avow the taking the beaſts damage-feaſant in any part of the common, but in that which is his own part. *Mich.* 8 *Jac. B. C.* Broadrig's caſe.

In what caſes the commoner may diſtrain the beaſts of the lord damage-feaſant, See above p. 26.

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CHAP. VI.

1. *Of the Intereſt the Lord hath in the Commoning, and his Remedy in either caſe for Diſturbance, &c.*
2. *His Intereſt in the Soil.*
3. *Of Approvement or Incloſure of Commons by the Lord, at common Law. Where and in what Caſes, and how Approvement may be made. The Remedy of the Commoner, if the Lord leave not ſufficient Common.*
4. *Of the ſeveral Statutes made relative to the Incloſure of Commons.*

THE lord of the manor has the ſole intereſt in the *ſoil* of the common; but the intereſt of the lord and the commoner in the *common*, are looked upon in law as mutual. 2 *Blac. Com.* 34. 9 *Rep.* 113.

Lord's intereſt in the common.

And it ſeems agreed that a cuſtom of preſcription totally to exclude him from all manner of profit is void, as unreaſonable, and againſt law. *Co. Lit.* 122. *a.* For it is againſt the nature of the word common; and it was implied in the firſt grant, that the owner of the ſoil ſhould take his reaſonable profit there. *Ibid.*

If therefore there be granted to another, common without number, yet the grantee cannot put ſo many cattle thereon as not to leave the lord ſufficient for his cattle. 2 *Roll. Ab.* 396. 399. *Bridg.* 5. *Roll. Rep.* 365. *Sand.* 245.

And if the common be ſurcharged, the lord may diſtrain. 9 *Rep.* 113. And may bring an action for any damage done therein. *Ibid.*

The lord may, however, by preſcription, be reſtrained to a certain number. 2 *Roll. Ab.* 267. *pl.* 2.

As he may, ſays Coke, by preſcription be excluded for a certain period, as from ſuch a day to ſuch a day. *Co. Lit.* 122. *a.*

This however has been the ſubject of much argument ſince Coke's time. In the firſt caſe in which the point came under diſcuſſion, the Court of Common Pleas was equally divided. North v. Cox. *Vaugh.* 251. 1 *Lev.* 253. In the ſecond, which came before the Court of King's Bench, the Court inclined to think ſuch a preſcription good. Potter v. North. 1 *Vent.* 383. 1 *Saund.* 347. 1 *Lev.* 268. But in the third caſe, the whole Court of King's Bench adjudged for the preſcription. Hopkins v.

APPROVEMENT. Robinſon. *Pollexf.* 13. 1 *Mod.* 74. *a.* 2 *Saund.* 324. 2 *Lev.* 2. Since which time the doctrine of Lord Coke ſeems to be generally acquieſced in. *Co. Lit.* 122. *a. n.* 6.

As he alſo may, it ſhould ſeem, from all right of depaſturage whatever, for this does not exclude him from all manner of profit from the ſoil, as he will ſtill be entitled to the mines, trees, &c. North v. Cox. *Vaugh.* 251. 1 *Lev.* 253. Potter v. North. 1 *Vent.* 383. 1 *Saund.* 350. 1 *Leo.* 268. Hopkins v. Robinſon. 1 *Mod.* 74. 2 *Lev.* 2. 2 *Keb.* 757. 842. 1 *Vent.* 123. 163. *Pollexf.* 13.

But if he be not limited as aforeſaid by preſcription, he may put in any number of cattle, leaving ſufficient for the commoners; and may ſurcharge any ſurplus of common there may be. *Fit. N. B.* 125.

The lord cannot without a preſcription to that effect, *agiſt* the cattle of a ſtranger in the common. *Roll. Ab.* 396. *Skin.* 137.

But he may licenſe a ſtranger to put in his cattle leaving ſufficient for the commoners. Smith v. Feveral. 2 *Mod.* 6. 7. 275. Such licence however, it is ſaid, muſt be by deed. 2 *Lev.* 2.

And if ſuch licence be for a certain time only, it will extend to all kind of cattle, &c. whether commonable or not. 2 *Mod.* 7.

But if it be general, for a time unlimited, it ſhall be conſtrued to extend to commonable cattle only. 2 *Mod.* 7.

2. *His Intereſt in the Soil.*

Lord's right in the ſoil. The right of the lord in the ſoil, and his right in the common, are not inſeparable; but he may alien the ſoil in fee; reſerving his right of common as theretofore: but if he make no ſuch reſervation, the right of common will paſs with a grant of the ſoil. *Roll. Ab.* 396.

The right of the commoners may by precription be ſubſervient to the right of the lord in the ſoil, ſo that he may dig clay, &c. there, and licence others to do ſo, even to the deſtruction of the neceſſary herbage for the commoners. Bateſon v. Green. 5 *T. Rep.* 411.

But unleſs there be ſome preſcription, or a ſaving in the grant of the lord, any grant by him will be paramount to any previous right of his; and therefore if he grant a right of common in a certain place, he cannot even erect a rick there. Farmer v. Grant. *Cro. Jac.* 271. *Yelv.* 201.

The lord alſo may by preſcription, with the conſent of the homage, grant a part of the ſoil of the common to be built upon. Folkard v. Hemmett. 5 *Term Rep.* 417. *n.* APPROVEMENT.

And ſo the owners of ancient meſſuages within a manor have been allowed to hold diſcharged of common, certain portions of the common aſſigned them by the moſs-reeve for the purpoſe of digging turf. Clarkſon v. Woodhouſe. 4 *Term Rep.* 412.

The lord may diſtrain for damage-feaſant, or other damage in his ſoil, the beaſts of any one who had not right to put them there, though he had not any intereſt in the herbage. 2 *Saund.* 328.

The lord may have action for every ſmall treſpaſs; but the commoner ſhall not have an action on the caſe for every ſmall treſpaſs. *Fits. N. Br.* 38.

If a man who claims common appurtenant, puts in any beaſts which are not *levant* and *couchant*, he doth wrong to the lord, and ſhall be puniſhed as a treſpaſſer. 2 *Saund.* 327. Where a commoner ſhall be a treſpaſſer.

3. *The Right of the Lord to improve and incloſe a Common.*

Approvement is a right given to the lord by the ſtatute of Merton, 20 *Hen.* 3. *c.* 4. to incloſe and convert to the uſes of huſbandry (which is a melioration or approvement) any waſte grounds, woods, or paſtures, in which his tenants have common appendant to their eſtates. 3 *Blac. Com.* 240.

But as the right of common iſſues out of the whole waſte, there could not at common law be any incloſure or approvement thereof. 2 *Inſt.* 85.

Unleſs againſt thoſe who had only common appendant. 2 *Inſt.* 474.

But now by the ſaid ſtatute of Merton, and other ſubſequent ſtatutes, the lord of the manor may incloſe ſo much of the waſte as he pleaſes for tillage or wood-ground, ſo that he leave ſufficient common for the commoners according to the proportion of their land. 3 *Blac. Com.* 241. See *Stat. Mer.* 20 *H.* 8. *c.* 1. 2 *Inſt.* 85. *Vaugh.* 257. 29 *Geo.* 2. *c.* 36. 31 *Ibid. c.* 41.

And, as Sir W. Blackſtone obſerves, this is extremely reaſonable, for it would be very hard if the lord, whoſe anceſtors granted out theſe eſtates to which the commons are appendant, ſhould be precluded from making what advantage he can of the rent of his manor, provided ſuch

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advantage and improvement be no way derogatory from the former grants. 3 *Blac. Com.* 240.

And though, on the conſtruction of the ſtatute of Merton, it was formerly holden, that it would enable the lord only to approve againſt his tenants. 2 *Inſt.* 85. Yet it is now held, that any perſon ſeiſed in fee of part of the waſte, may approve as well as the lord, provided he leave ſufficient common for the reſt of the commoners intereſt. 2 *Inſt.* 87. 3 *T. Rep.* 445.

But if the lord or other owner of the fee, by ſuch incloſure leave not ſufficient common for the other commoners, the commoner may break down the incloſure, 2 *Inſt.* 88.; or have his remedy by action of aſſize, or of treſpaſs. 2 *Inſt.* 88. *Godb.* 117. 4 *Rep.* 37. 8 *Ibid.* 79. *Dy.* 316.

And by 3 *Ed.* 6. *c.* 3. (confirmed by ſtatute of Merton and Weſtm.); treble damages ſhall be given to the commoner who ſhall recover againſt the lord.

This however holds only in regard to commons recently incloſed, for if a common has been incloſed for the ſpace of thirty years, it ſhall not afterwards be thrown open. *Vern.* 32.

And if it be ſuggeſted that an incloſure is an improvement within the ſtatute of Merton, Chancery will grant an injunction to an action under that ſtatute, till the matter is determined at law. 2 *Vern.* 301, 356. And ſee *Chan. Ca.* 48. *Vern.* 456. *Chan. Rep.* 259. 2 *Vern.* 103.

And if incloſures rightfully made, or legally exiſting, be thrown down, the wrong-doer ſhall be indicted for the ſame; and if the men of the town near will not indict them, the ſaid towns near adjoining ſhall be diſtrained to make good the ſame at their own coſts, with damages (*a*). *Weſt.* 2. *c.* 46. See the caſes determined on this act. *Raym.* 487. *Lev.* 108. *Cro. Car.* 280. 440. 580. *Jones*, 307. *Sid.* 107. 212. *Mod.* 66. *Carth.* 241. 10 *Mod.* 157. *Ld. Raym.* 616. 2 *Inſt.* 476. *Roll. Rep.* 365. 2 *Inſt.* 477.

(*a*) By 6 *Geo.* 1. *c.* 16. the remedy provided by this act, is extended to the owners of trees cut down or deſpoiled.

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But this right of incloſure extends, as was formerly held, only to common of paſture, and not where commoners have a right of turbary, piſcary, digging ſand, or the like. 2 *Inſt.* 87. Duberly v. Page. 2 *Ter. Rep.* 391.

But it has lately been holden. that notwithſtanding ſuch right of the commoner, the lord may improve if he leave ſufficient common of paſture. 2 *Ter. Rep.* 391. Shakeſpear v. Pippin. 6 *Ter. Rep.* 741.

Nor can approvement of common be by any other means than by incloſure, for it muſt not be by digging of coals, &c. *Sid.* 106.

Nor can the lord approve the whole common, even though he leave the commoners ſufficient in other lands. 2 *Co.* 25. *b.*

And moreover by ſtatute of Weſt. 2. c. 46, the ſtatute of Merton ſhall bind neighbours, and ſuch as claim common of paſture appurtenant to their tenements; but not ſuch as claim common by ſpecial grant, or feoffment for a certain number, or otherwiſe.

Under which act the *tenant* may improve, if the lord has common in his grounds. 2 *Inſt.* 474, 475.

As may alſo, it is ſaid, any perſon who has only the herbage. *Carth.* 114. 241.

And the ſaid act has been held to extend (in the word neighbours) to one who dwells in another pariſh, if the pariſh adjoin to the common. 2 *Inſt.* 474.

Further by the ſame ſtatute, none ſhall be grieved by aſſize of novel diſſeiſin for common of paſture, by reaſon of any windmill, ſheepcote, dairy, enlarging of a court neceſſary for the owner's reſidence, or curtilage. See Nevill v. Hammerton. *Lev.* 62. *Sid.* 79. *Keb.* 283. 314.

The enumerating of which buildings, &c. it has been holden, is only for example; other neceſſary erections therefore may be made upon a common by way of approvement. 2 *Inſt.* 476. *Lev.* 62.

And if they be neceſſary under the conſtruction of this act, they will be allowed, even though by reaſon thereof ſufficient common be not left for the commoners. *Lev.* 62. 2 *Inſt.* 476.

Approvement does not extend to common in groſs. 2 *Inſt.* 86.

If there be a cuſtom for the commoners to incloſe, and any of them do incloſe by virtue thereof, the land remaining unincloſed, will be diſcharged of ſuch commoners' former right of common therein. Row v. Strode. 2 *Wils.* 269.

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If the lord alien in fee the ſoil where the common is taken, ſaving his power of paſture as lord, he ſhall have common there as lord, but not ſo without any ſaving; but the alienee of the ſoil may paſture it as the lord had done before. 1 *Roll. Abr.* 396.

4. *The ſeveral Statutes made relative to the Incloſure of Commons.*

29 Geo. 2. c. 36.

By 29 *Geo.* 2. c. 36. after reciting that by the ſtatute of Merton, it was provided, that lords of waſtes, woods, and paſtures, in which their tenants have common of paſture, reſerving to their tenants ſufficient paſture, as much as belongeth to their tenements, with ſufficient ingreſs and egreſs to the ſame, may approve the reſidue of ſuch waſtes, woods, and paſtures; and that by a ſtatute made in the 13 *Ed.* 3. called the ſtatute of Weſtminſter the Second, it was ordained, that the ſaid ſtatute of Merton ſhould hold place between lords of waſtes, woods, and paſtures, and their neighbours, having common appurtenant therein; and that proviſion was thereby made againſt caſting down dykes and hedges levied by ſuch as have right ſo to approve: and reciting that by an act made in the 3 and 4 *Ed.* 6. the ſaid ſtatutes, and all articles thereof, then not repealed, were confirmed: and that the ſaid proviſions for the approvement of waſtes, woods and paſtures, had been, in many caſes, rendered ineffectual, by the contradiction and diſſent of a few perſons having right of common in the ſaid waſtes, woods, and paſtures; who, under pretence that ſufficient paſture was not reſerved to them, diſturbed the lords of ſuch waſtes, woods, and paſtures, or their aſſigns, in the poſſeſſion of the ground and ſoil ſo approved, and diſcouraged them from aſſerting their right to make or continue ſuch approvement: and that the general proviſions made by an act of 35 *Hen.* 8. and by ſeveral other acts of parliament, for preſerving woods; and the particular proviſions made by two ſeveral acts of parliament of the 13 *Car.* 2. and 9 and 10 *Wil.* 3. whereby part of the waſte lands of the ſaid ſeveral foreſts are directed to be incloſed and kept in ſeveralty for the growth and preſervation of timber, had not been duly put in execution; and that, for want of a proper ſupply of timber of the growth of this kingdom, a great quantity of foreign timber was neceſſarily uſed for building ſhips and houſes, and for other purpoſes;

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and the general price of timber and wood greatly increaſed: and that many tracts of waſte land, unfit for tillage or paſture, but capable of producing different kinds of trees, might conveniently be incloſed for the growth of timber and underwood, to the advantage both of the owners of the ground and ſoil of ſuch waſtes, and alſo ſuch as have right of common therein; and that ſuch incloſure would alſo be of public utility. It was enacted,

Sec. 1. That it ſhould be lawful for his Majeſty, his heirs, and ſucceſſors, and all other owners of waſtes, woods, and paſtures, in that part of Great Britain called England, wherein any perſon or perſons, or body or bodies politic or corporate, hath or have right of common of paſture, by and with the aſſent of the major part in number and value of the owners and occupiers of tenements to which the ſaid right of common of paſture doth belong, and to and for the major part in number and value of the owners and occupiers of tenements by and with the aſſent of the owner or owners of the ſaid waſtes, woods, and paſtures, and to and for any other perſon or perſons, or body politic or corporate, by and with the aſſent and grant of the owner or owners of ſuch waſtes, woods, and paſtures, and the major part in number and value of the owners and occupiers of ſuch tenements, to incloſe and keep in ſeveralty, for the growth and preſervation of timber or underwood, any part of ſuch waſtes, woods, and paſtures, for ſuch time, and in ſuch manner, and upon ſuch conditions, as ſhall be agreed by them reſpectively.

Proprietors of waſtes, &c.

and perſons having a right of common thereon,

may, by mutual conſent, incloſe any part thereof, for planting and preſerving timber or underwood.

Sec. 2. That in caſe any recompence ſhall be agreed to be given for ſuch incloſure, to, or to the benefit of the owners and occupiers of tenements, to which the right of common in ſuch waſtes, woods, and paſtures doth belong, ſuch recompence ſhall be made either by a grant of a ſhare of the profit which ſhall ariſe from the ſale of the timber or underwood growing on the ground or ſoil ſo incloſed, or by a grant of other lands, tenements, or hereditaments; or by ſome annuity or rent-charge iſſuing out of the ſaid ground or ſoil ſo incloſed, or out of other lands, tenements, or hereditaments; or ſhall be paid in money, to be placed out at intereſt on public ſecurities, or laid out in the purchaſe of lands, tenements, or hereditaments, or of ſome annuity or rent-charge iſſuing out of lands, tenements, or hereditaments; and the produce of ſuch lands, tenements, or

If any recompence be agreed thereupon to be given to the tenant; how, and in what manner the ſame is to be made and applied.

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If lords and tenants join in aſſigning over their reſpective rights of incloſure to any other perſons,

how recompence is to be made to the lord, if he have not the fee-ſimple therein, or be diſabled to alienate.

Pariſh willing to purchaſe ſuch right for the employment and benefit of their poor.

ſuch recompence out of any monies ariſing from the rates raiſed, or to be raiſed, for the relief of the poor; and out of ſuch monies to pay, from time to time, ſuch charges and expences as ſhall be neceſſary for incloſing and preſerving ſuch grounds ſo incloſed; and ſuch overſeer or overſeers ſhall, from time to time, apply the profit which ſhall ariſe from the ſale of the timber or underwood growing thereon, towards the relief of the poor of the ſaid pariſh or townſhip; and ſhall account for the ſame in like manner as he and they is and are by law obliged to account for the rates collected for the relief of the poor.

Recompence, and other charges to be paid out of the poor's rate, and the profits to be applied in aid thereof.

Sec. 3. That every agreement for any ſuch incloſure ſhall be in writing, and ſigned by the parties, and the ſame ſhall be regiſtered and inrolled by the clerk of the peace for the county, riding, or diviſion, where ſuch waſtes, woods, or paſtures, or the greater part of them, ſhall lie, within three months next after the execution of ſuch agreement.

Agreements to be ſigned and regiſtered within three months after execution.

Sec. 4. That it ſhall be lawful to and for all perſons, or bodies politic or corporate, who ſhall think themſelves injured or aggrieved by ſuch agreement, or for any perſons in their behalf, within ſix months next after any ſuch agreement ſhall be regiſtered and inrolled in manner aforeſaid, to make complaint thereof by appeal to the juſtices of the peace at any quarter ſeſſions to be held for the ſame county, riding, or diviſion, who are hereby authoriſed and required to hear and determine ſuch appeal, and whoſe determination therein ſhall be final; and if no ſuch appeal ſhall be made, then the ſaid agreement, ſo regiſtered and inrolled as aforeſaid, ſhall be for ever binding to all perſons whatſoever, without any further or other appeal.

Perſons aggrieved by ſuch agreement, may appeal to the quarter ſeſſions within a limited time.

In caſe there be no appeal, agreement to ſtand good.

Sec. 5. That it ſhall be lawful to and for all bodies politic or corporate, whether aggregate or ſole, and all feoffees in truſt, executors, adminiſtrators, guardians, committees, or other truſtees whatſoever, for and on the behalf of any infants, femes-covert, lunatics, ideots, or other perſons whatſoever, and the huſbands of femes-covert, who ſhall be ſeiſed, poſſeſſed of, or intereſted in any ſuch waſte, wood, or paſture, or any right of common in ſuch waſtes, woods, or paſtures, to agree to any ſuch incloſure; and all ſuch agreements, ſo made, ſhall be valid to all intents and purpoſes; and ſuch bodies politic or corporate, feoffees in truſt, executors, adminiſtra-

Bodies politic, guardians and truſtees, impowered to agree to any ſuch incloſure.

INCLOSING. tors, guardians, committees, and other truſtees, and huſbands of femes-covert, ſhall be indemnified for what they ſhall ſo do by virtue of this act.

If any trees growing within ſuch incloſures ſhall be unlawfully cut or deſtroyed, damage to be made good by the adjoining pariſh;

Sec. 6. That if any perſon, from and after the time hereby limited for bringing ſuch appeal againſt any ſuch agreement for the incloſure of any part of ſuch waſtes, woods, or paſtures, ſhall either by day or by night unlawfully cut, take, deſtroy, break, throw down, bark, pluck up, burn, deface, ſpoil, or carry away, any trees growing within any ſuch incloſure, without the conſent of the owner or owners thereof, ſuch owner or owners ſhall have ſuch remedy, and have and receive ſuch ſatisfaction and recompence of and from the inhabitants of the pariſhes, towns, hamlets, villages, or places adjoining to ſuch incloſures, and recover ſuch damages againſt the inhabitants of ſuch pariſhes, towns, hamlets, villages, or places adjoining, and in the ſame manner and form as is directed for dykes and hedges overthrown by the ſaid act of 13 *Ed.* 1. unleſs the offender or offenders ſhall be convicted of ſuch offence within the ſpace of ſix months next after the commiſſion thereof.

unleſs the offender be convicted within ſix months.

Offences to be tried and determined by two juſtices, or at the ſeſſions.

Sec. 7. That it ſhall be lawful to and for any two juſtices of the peace of the county, riding, diviſion, city, town, liberty, or place, wherein any ſuch offence ſhall be committed, or for the juſtices of the peace for ſuch county, riding, diviſion, city, town, liberty, or place, in open ſeſſions, upon complaint to them made, to cauſe every ſuch offender to be apprehended for ſuch treſpaſs, and to hear and determine the ſame, and to inflict the like penalty and puniſhment on every offender by them convicted, as is directed to be inflicted on offenders by the act of 6 *Geo.* 1. in the ſixth year of the reign of his late Majeſty.

Penalty on conviction, the ſame as is enacted by act 6 Geo. 1.

and perſons unlawfully cutting or deſtroying trees on commonable grounds, to be in like manner convicted, and puniſhed.

Sec. 8. That if any perſon, after the 1ſt July, 1756, ſhall unlawfully cut, take, deſtroy, break, throw down, bark, pluck up, burn, deface, ſpoil, or carry away, any tree growing in any waſte, wood, or paſture, in which any perſon or perſons, or body or bodies politic or corporate, hath or have right of common, every ſuch offender ſhall and may be in like manner convicted of ſuch offence, and ſhall incur the like penalty.

Doubt ariſing on clauſe in act 9 Geo 1. obviated.

Sec. 9. After reciting that by an act made in 9 *Geo.* 1. the inhabitants of every hundred in England, ſhould make ſatisfaction to all perſons for the damages they might have ſuſtained by the cutting down or deſtroying

any trees which shall be done by offenders against the said act: and that doubts had arisen whether the provision made by the said act, had not repealed the remedy given by the said acts, of the *first* and *fifth* years of the reign of his said late Majesty: for obviating the said doubt, it was enacted, that after the 1st of July, 1756, it shall be lawful for any person, or body politic or corporate, to take remedy for the before-mentioned damages, either against the parish, town, hamlet, vill, or place, where any of the said offences shall be committed, according to the powers given by the said acts of the *first* or *fifth* years of his said late Majesty's reign, or on the hundred wherein any of the said offences shall be committed, as to such person, or body politic or corporate, shall seem most meet.

INCLOSING.

and remedy for damage mentioned in the said clause may be taken according to the recited acts of 1 and 6 Geo. 1.

Sect. 10. That if any action shall be brought against any person for any matter or thing done by virtue or in execution of this act, the defendant or defendants in every such action may plead the general issue, and give this act, and the special matter in evidence on any trial to be had in such action; and if the plaintiff or plaintiffs shall discontinue such action, or become nonsuit, or if judgment shall be given against such plaintiff, then the defendant or defendants, in every such action, shall recover treble costs of suit.

General issue.

Treble costs.

And by 31 *Geo.* 2. *c.* 41. *(for amending and rendering more effectual the last mentioned act)*, after reciting that it was by such act enacted, that it should be lawful for his Majesty, his heirs, and successors, and all other owners of wastes, woods, and pastures, in that part of Great Britain called England, wherein any person or persons, or body or bodies politic or corporate, hath or have a right of common of pasture, by and with the assent of the major part in number and value of the owners and occupiers of tenements, to which the said right of common of pasture doth belong, and to and for the major part in number and value of the owners and occupiers of such tenements, by and with the assent of the owner or owners of the said wastes, woods, and pastures, and to and for any other person or persons, or body politic or corporate, by and with the assent and grant of the owner or owners of such wastes, woods, and pastures, and the major part in number and value of the owners and occupiers of such tenements, to inclose and keep in severalty, for the growth and preservation of timber or underwood, any part of such

31 Geo. 2. c. 41.

INCLOSING. waſtes, woods, and paſtures, for ſuch time, and in ſuch manner, and upon ſuch conditions, as ſhall be agreed by them reſpectively: and that it was by the ſaid act provided, that in caſe any recompence ſhould be agreed to be given for ſuch incloſure, to or for the benefit of the owners and occupiers of the tenements to which the right of common in ſuch waſtes, woods, and paſtures belonged, ſuch recompence ſhould be made, either by a grant of a ſhare of the profit which ſhould ariſe from the ſale of the timber or underwood growing on the ground or ſoil ſo incloſed, or by a grant of other lands, tenements, or hereditaments, or by ſome annuity or rent charge iſſuing out of the ſaid ground or ſoil ſo incloſed, or out of other lands, tenements, or hereditaments, or ſhould be paid in money, to be placed out at intereſt on public ſecurities, or laid out in the purchaſe of lands, tenements, or hereditaments, or of ſome annuity or rent charge iſſuing out of lands, tenements, or hereditaments; and the produce of ſuch lands, tenements, or hereditaments or ſuch annuity or rent charge, or the intereſt of ſuch money, until the ſame ſhall be laid out in ſuch purchaſe as aforeſaid, ſhould be paid, from time to time, to the overſeers or overſeer of the poor of the ſaid pariſh or townſhip, and be by them or him applied towards the relief of the poor of the pariſh or townſhip where ſuch waſtes, woods, or paſtures, might lie, and accounted for in ſuch manner as the rates for relief of the poor are by law directed to be accounted for: and that in many caſes the right of common of paſture in the ground or ſoil incloſed, or intended to be incloſed, might not belong to all the owners and occupiers of tenements within the pariſhes or townſhips wherein ſuch waſtes, woods, or paſtures, might lie: and that the owners and occupiers of ſuch tenements, to which ſuch peculiar right of common belonged, might refuſe their aſſent to an incloſure, the recompence for which was applicable to the general relief of the poor of the pariſh, and not to them in proportion to their particular intereſts; and yet they might be willing to accept a different recompence from that which is provided by the ſaid act.

The recompence to be made under the recited act in reſpect of

Sec. 1. It was enacted, that from and after the 1ſt of Aug. 1758, every recompence to be made by virtue of the ſaid act, ſhall be made to the perſon or perſons intereſted in reſpect of the rights of common of paſture in grounds to be incloſed for planting trees, is to be paid to the perſons reſpectively intereſted therein, and not to the overſeers of the poor.

reſted in the ſaid right of common, in proportion to their reſpective intereſt or intereſts therein: and not to be paid to the overſeer or overſeers of the poor, as is directed by the ſaid act.

Tenants for life, or for terms of years determinable thereupon, may execute the powers given by the recited and this act, during their reſpective intereſts.

Sect. 2. And it is further enacted, that (as doubts may ariſe whether tenants for life, or for terms of years, determinable upon one or more life or lives, be owners within the meaning of this act, and that of 29 Geo. 2.); the powers given to ſuch owners by this act, and the ſaid act of 29 Geo. 2. may be executed by ſuch tenants for life, or years, during their reſpective intereſts.

But no act of theirs is to have effect, after the determination of ſuch their eſtate.

Sect. 3. That nothing done by ſuch tenants for life, or terms of years by virtue of this act, or by the act of the twenty-ninth of Geo. 2. ſhall have effect or continuance after the determination of the eſtate of ſuch tenants for life, or terms of years.

13 Geo. 3. c. 81.

And further, by 13 Geo. 3. *c.* 81. intituled "*An act for the better cultivation, improvement, and regulation, of the common arable fields, waſtes, and commons of paſture, in this kingdom*:" after reciting that there were, in ſeveral pariſhes and places in this kingdom, ſeveral waſtes and commons, and ſeveral open and common fields, which, by reaſon of the different intereſts the ſeveral land owners and occupiers, or perſons having right of common, had in ſuch waſtes, commons, and fields, could not be improved, cultivated, or enjoyed, to ſuch great advantage for the owners and occupiers thereof, and perſons having right of common, as they might be, and were capable of, if an improved courſe of huſbandry was to be purſued, reſpecting ſuch open and common fields, in each pariſh reſpectively, and ſuch waſtes, or commons of paſture, were to be properly drained, or otherwiſe amended;

How arable lands ſhall be fenced.

Sec. 1. It is enacted, that in every pariſh or place in this kingdom, where there are open or common field lands, all the tillage or arable lands lying in the ſaid open or common fields ſhall be ordered, fenced, cultivated and improved, in ſuch manner, by the reſpective occupiers thereof, and ſhall be kept, ordered, and continued, in ſuch courſe of huſbandry, and be cultivated under ſuch rules, regulations, and reſtrictions, as three-fourths in number and value of the occupiers of ſuch open or common field lands in each pariſh or place, cultivating and taking the crops of the ſame, and having the conſent of the owners in manner herein-after mentioned,

INCLOSING. and likewiſe the conſent of the rector, impropriator or tithe owner, or the leſſee of either of them reſpectively, firſt had in writing, ſhall, at a meeting, (in purſuance of notice for that purpoſe, in writing, under the hands of one-third of ſuch occupiers, to be affixed on one of the principal doors of the pariſh church, chapel, or place, where meetings have been uſually held for ſuch pariſh or place reſpectively, twenty-one days at leaſt, before ſuch meeting, ſpecifying the time and place of ſuch meeting), by writing under their hands, conſtitute, direct, and appoint: and which notice any of ſuch occupiers are hereby authoriſed and impowered to give.

Rules not to be longer binding than 6 years.

Sect. 2. That the rules, regulations, and reſtrictions, ſo agreed upon, ſhall not be in force, or binding upon any of the parties thereto, for any longer term than ſix years, or two rounds, according to the ancient and eſtabliſhed courſe of each pariſh or place reſpectively.

Field maſter how to be appointed.

Sect. 3. That at every ſuch meeting to be had as aforeſaid, it ſhall and may be lawful to and for the major part in number and value of the occupiers (then preſent) of ſuch open or common field lands, in each pariſh or place reſpectively, to elect and chuſe one or more proper perſon or perſons as field maſter or field reeve, field maſters or field reeves, to ſuperintend the ordering, fencing, cultivating, and improving, of ſuch open and common fields, and to ſee that the ſame are kept, ordered, and continued, in ſuch a courſe of huſbandry, as ſhall be conſtituted, directed, and appointed, at ſuch meeting, in manner aforeſaid; and that ſuch field maſter or field reeve, ſo to be elected and choſen as aforeſaid, ſhall continue in the ſaid office until the twenty-firſt day of May, then next following, or within three days after, and no longer, unleſs he or they ſhall be thereto re-elected and choſen in manner herein after directed.

Expenſes how to be defrayed.

Sect. 4. That all coſts, charges, and expences, neceſſary for the carrying on any ſuch plan of ordering, fencing, cultivating, or improving into execution as ſhall be agreed upon in manner aforeſaid, and which ſhall, at any meeting to be held after ſix days notice having been given in manner herein-before directed, by the major part in number and value of the occupiers aforeſaid then preſent, be deemed common expenſes, and, for the general benefit of the ſaid occupiers, ſhall be borne, paid and defrayed, proportionably by all the occupiers of ſuch open and common field lands, accord-

ing to the value of the lands and grounds each perſon or perſons ſhall have in ſuch open and common field lands; and for the raiſing the ſame, one or more aſſeſſment or aſſeſſments, upon all and every the occupiers of common field lands in each pariſh reſpectively, ſhall be made, levied, and collected, by ſuch perſon and perſons, and allowed in ſuch manner, as ſuch majority of the occupiers of ſuch open and common field lands, at ſuch meeting to be had as aforeſaid, ſhall direct and appoint in that behalf; and the money thereby raiſed ſhall be employed and accounted for, according to the orders and directions of ſuch majority of the occupiers of ſuch common field lands, for and towards the better cultivation of the ſaid common field lands, from time to time, as need ſhall require; and the ſaid aſſeſſments ſhall, by virtue of a warrant under the hand and ſeal of one juſtice of peace of the county wherein ſuch common field lands ſhall lie, be levied by diſtreſs and ſale of the goods and chattels of every perſon ſo aſſeſſed and not paying the ſame, within ten days after demand, rendering the overplus of the value of the goods ſo diſtrained (if any) to the owner or owners of ſuch goods and chattels, after deducting the coſts and charges of taking and making ſuch diſtreſs and ſale. INCLOSING.

Occupiers of common field lands in every pariſh how to aſſemble and elect field reeves.

Sect. 5. That it ſhall be lawful for the occupiers of open and common field lands, in any pariſh or place where any rules, orders, or regulations, ſhall have been agreed upon, for the ordering, fencing, cultivating, or improving of ſuch lands, in purſuance of this act, and they are hereby required, to meet and aſſemble at ſome convenient place, yearly, and every year, on the twenty-firſt day of May, or within three days after, in purſuance of ſix days notice to be given of the time and place of meeting by one-third of the occupiers, in manner aforeſaid, then and there to elect and chuſe one or more proper perſon or perſons to be the field maſter or field reeve, field maſters or field reeves, for the year enſuing; and that ſuch perſon or perſons who ſhall, by the major part of the occupiers of the ſaid lands, preſent at ſuch meeting, be choſen field maſter or field reeve, field maſters or field reeves, to ſuperintend the ordering, fencing, cultivating, and improving of the ſaid common field lands, and to ſee that the ſame be cultivated according to the rules, orders, and regulations, agreed upon at the general meeting for that purpoſe, and ſhall continue in

INCLOSING. the ſaid office for one whole year, unleſs he ſhall die, or be removed, by virtue of the power and authority hereinafter given in that behalf.

New field reeves to be appointed in place of thoſe who ſhall die, or refuſe to attend.

Sec. 6. That if any field maſter or field reeve, ſo to be choſen in purſuance of this act, ſhall, within the year in which he ſhall be ſo choſen, refuſe or neglect to attend the ſaid buſineſs, or ſhall die, or remove to an inconvenient diſtance, or become bankrupt, or have execution againſt his body or goods, or by ſickneſs, or otherwiſe, be rendered incapable of executing his ſaid office; that then, and in either of the ſaid caſes, it ſhall be lawful to and for the occupiers of the ſaid lands, (after ſix days notice for that purpoſe to be given in manner aforeſaid), to elect and chuſe, in manner aforeſaid, one other fit and proper perſon to be the field maſter or field reeve for the remainder of that year, in the place and ſtead of the former field maſter or field reeve falling under either of the deſcriptions aforeſaid.

Occupiers at meetings, to ſettle the time of opening common field land.

Sect. 7. That it ſhall be lawful for *three-fourths* in *number* and *value* of the occupiers of open and common field lands, preſent at any meeting to be held in purſuance of *fourteen* days notice at leaſt, previous to the uſual time of opening ſuch common field lands, to be given for that purpoſe, in manner aforeſaid, to poſtpone the opening ſuch common field lands for ſuch reaſonable time as at ſuch meeting ſhall be thought neceſſary by ſuch majority as aforeſaid, and to ſettle and determine how long ſuch common fields ſhall continue open, and to limit and ſettle the number of cattle each occupier in ſuch pariſh or place ſhall reſpectively turn on ſuch common fields, in due proportion to the ſtint or eſtabliſhed uſage in ſuch pariſh or place.

Cottagers not to be excluded having right of common.

Sect. 8. That nothing in this act contained ſhall be conſtrued to extend to exclude any cottager, or other perſon or perſons whomſoever, having right of common, and having no land in any of the ſaid common fields from having and enjoying his or their right of common, in as full and ample manner as he could and might have enjoyed the ſame before the paſſing of this act, unleſs ſuch cottager, or other perſon, ſhall, at any meeting to be held by the occupiers of ſuch common field lands, in manner aforeſaid, conſent or agree, in writing, to a compoſition for ſuch right, by an annual payment, or other annual advantage or compenſation, or to a limitation thereof; in which caſe ſuch conſent and agreement ſhall

be binding and concluſive upon every ſuch perſon ſo agree- INCLOSING.
ing, his heirs and aſſigns, tenants and occupiers, until
ſuch time as the rules, orders, and regulations, for the ordering, fencing, cultivating, and improving of the ſaid common field lands, exiſting at the time of giving ſuch conſent, ſhall expire.

Sec. 9. That if the occupiers of the ſaid common field lands ſhall, at times when the ſaid fields have been uſually enjoyed in common, conſent and agree not to depaſture the ſame in common, and ſhall allot and ſet apart what ſhall be deemed by a majority of ſuch cottagers, who ſhall not have agreed to compound for or limit their right of common, as aforeſaid, a ſufficient and equivalent common for ſuch cottagers, and other perſons, as aforeſaid, to be enjoyed excluſively by them; that then, and in ſuch caſe, ſuch cottagers and other perſons ſhall not uſe, exerciſe, or enjoy their right of common, over ſuch parts of the ſaid common field lands, as are not uſed in common by the occupiers thereof, but only over ſuch part thereof as ſhall for ſuch time be allotted them for that purpoſe, and ſet apart as aforeſaid; any law, uſage, or ſtatute, to the contrary notwithſtanding.

Sec. 10. That nothing herein contained ſhall exclude any perſon or perſons ſeized or poſſeſſed of a ſeparate ſheep walk, or paſture of cattle, in or over all or any of the common field lands in any pariſh or place, or in or over any part thereof, from uſing, exerciſing, and enjoying, ſuch right, in as full and ample manner, to all intents and purpoſes, as he might or could have enjoyed the ſame before the paſſing this act, unleſs ſuch perſon or perſons, having ſuch right as aforeſaid, ſhall conſent or agree in writing at any meeting of occupiers, to be held as aforeſaid, to a compoſition for the ſame, or a limitation thereof; in which caſe every ſuch conſent and agreement ſhall be binding and concluſive upon every perſon ſo agreeing, and upon every other perſon coming to the poſſeſſion of ſuch ſheep walk or paſture for cattle, by deſcent, or otherwiſe, until ſuch time as the rules, orders, and regulations, for the cultivation of the ſaid common field lands, exiſting at the time of entering into ſuch agreement, ſhall expire. Saving of right to perſons poſſeſſed of ſeparate ſheep walks, &c.

Sec. 11. After taking notice that balks, ſlades, or metes, which might be waſte, often lay very inconveniently interſperſed amongſt the arable lands in com- Balks, ſlades, &c. with conſent of the lords of manors, &c.

INCLOSING. mon fields,) that it ſhall and may be lawful to and for any perſon or perſons whomſoever, having land in any open or common fields adjoining to any ſuch balks, ſlades, or meers, being waſte, with the conſent of the lord or lords, lady or ladies, of the reſpective manors wherein ſuch balks, ſlades, or meers, do lie, and likewiſe of the perſon or perſons who may have a ſeparate ſheep walk in the ſaid fields, and with the conſent of three-fourths in number and value of the occupiers of ſuch common field lands, to be ſignified at any meeting to be held in manner aforeſaid, to plough up any of the ſaid balks, ſlades, or meers, and convert the ſame into tillage, under the regulations to be ſettled as aforeſaid.

may be ploughed.

Balks, &c. uſed as roads not to be ploughed.

Sec. 12. That no balk or meer, that has heretofore been uſed as a public road, or as a private road, by any perſon or perſons, to or from his or their own houſe or lands, be ſo ploughed up.

Regulations to be obſerved by perſons having a licence to plough balks, &c.

Sec. 13. That all and every perſon and perſons, who ſhall have licenſe, in manner aforeſaid, to plough up and convert into tillage, any balk, ſlade, or meer, ſhall, before he or they begin to plough up the ſame, lay down, in an huſband-like manner, under the direction of the field maſter or field reeve for the time being, in a more convenient part of the ſaid field, as much of his or their own land as ſhall be equal in value to the land he or they ſhall ſo have licenſe to plough as aforeſaid; and that ſuch land ſo laid down, ſhall be common land, and ſo continue until the regulations then exiſting for cultivating ſuch common field lands ſhall expire.

Boundary ſtones to aſcertain every perſon's property may be erected.

Sec. 14. That the perſon or perſons ploughing any ſuch balk, ſlade, or meer, ſhall, by proper bound ſtones, ſufficiently mark and diſtinguiſh the ſeveral lands ploughed, and the ſeveral lands laid down in lieu thereof, ſo that the property thereof, and each perſon's right therein, may be clearly known and aſcertained,

Lords of manors, &c. with conſent of three-fourths of perſons having right of common, may leaſe a twelfth part of waſtes.

Sec. 15. That it ſhall and may be lawful to and for the lord or lords, lady or ladies, of any manor, with the conſent of three-fourths of the perſons having right of common upon the waſtes and commons within his, her, or their manor, at a meeting to be held after fourteen days notice, ſuch notice to be given in manner hereinbefore directed by the lord or lords, lady or ladies of the manor, or their agent reſpectively, at any time or times, to demiſe or leaſe, for any term or number of years, not exceeding four years, any part of ſuch waſtes and com-

mons, not exceeding a twelfth part thereof, for the beſt and moſt improved yearly rent that can by public auction be got for the ſame; and that the clear net rents reſerved to the lord or lords, lady or ladies, his, her, or their heirs, executors, adminiſtrators, or aſſigns, by any leaſe or leaſes, to be granted as aforeſaid, ſhall be by him, her, or them, and the major part of his, her, or their tenants, applied in the draining, fencing, or otherwiſe improving of the reſidue of ſuch waſtes and commons.

and the net rents to be applied for improving the reſidue of ſuch waſtes.

Sec. 16. That in every manor where there are ſtinted commons, in lieu of demiſing or leaſing part thereof, one or more aſſeſſment or aſſeſſments upon the lord or lords, lady or ladies, of ſuch manor, and the perſons being owners or occupiers of ſuch commons, or their agents or managers, ſhall or may, at their option, be made, levied, and collected, by ſuch perſon and perſons, and allowed in ſuch manner, as the lord or lords, lady or ladies, of ſuch manor, and the major part in number and value of the owners or occupiers of ſuch commons, preſent at a meeting to be held within the ſaid manor, in purſuance of fourteen days notice to be given by the lord or lords, lady or ladies, or his, her, or their agent, in manner aforeſaid, of the time and place of meeting for that purpoſe, ſhall direct and appoint in that behalf; and the money thereby raiſed ſhall be employed and accounted for, according to the orders and directions of the ſaid lord or lords, lady or ladies, and ſuch majority of the owners or occupiers, as aforeſaid, in the improvement of ſuch commons, from time to time, as need ſhall require; and the ſaid aſſeſſment ſhall, by virtue of a warrant under the hand and ſeal of one juſtice of the peace, be levied by diſtreſs and ſale of the goods and chattels of every perſon ſo aſſeſſed, and not paying the ſame within ten days after being demanded, rendering the overplus of the value of the goods ſo diſtrained (if any) to the owner and owners thereof, the neceſſary charges of making ſuch diſtreſs and ſale being firſt deducted.

Aſſeſſments to be levied for the improving of waſtes where there are ſtinted commons.

Sec. 17. (After taking notice that there were, in many parts of the kingdom, certain ſtinted commons of paſture which are never enjoyed in ſeveralty, but which are at certain times ſhut up for the better growth of the paſture, and opened on certain fixed days, from which, in particular circumſtances and ſeaſons, great inconveniences ariſe,) that it ſhall be lawful for the major

Stinted commons to be opened at a certain time as owners, &c. at a meeting ſhall direct.

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part in number and value of the owners and occupiers of ſuch common paſtures, preſent at a meeting to be held after ſix days notice at leaſt given, in manner hereinbefore directed, with the conſent of the lord or lords, lady or ladies, of the manor, or his, her, or their ſteward or agent, to poſtpone the opening of the ſaid common paſtures for a time not exceeding twenty-one days.

Two-thirds of commoners, with conſent of the lord of the manor, &c. may direct the opening and ſhutting of common paſtures, &c.

Sec. 18. (After taking notice that there were in many places common paſtures, with ſtinted or limited rights of common therein, which are open the whole year, and it would be attended with great advantages to the commoners to ſhut up and unſtock the ſame at particular ſeaſons,) that it ſhall be lawful for two thirds in number and value of ſuch commoners, at a meeting to be holden after fourteen days notice given in manner hereinbefore directed, with the conſent of the lord or lords, lady or ladies, of the manor or manors in which ſuch commons are ſituated, his, her, or their ſteward or ſtewards, agent or agents, to direct, order, and fix, the time when ſuch common paſtures ſhall be broke or depaſtured, and when the ſame ſhall be ſhut up and unſtocked; ſuch orders to continue in force for one whole year, and no longer.

Proviſo reſpecting perſons not conſenting to the above regulations.

Sec. 19. That a portion of ſuch common paſture ſhall be ſeparated and ſet apart for the uſe of ſuch commoners excluſively as ſhall not conſent to ſuch regulation, and the portion ſo ſet apart ſhall be adjudged by a majority of ſuch commoners, not conſenting as aforeſaid, an equivalent for their rights of common.

Perſons having right of common may depaſture ſheep inſtead of other cattle.

Sec. 20. (After taking notice that many ſtinted common paſtures in this kingdom are fed and depaſtured by horſes, beaſts, or neat cattle, and in many inſtances it would tend to the improvement of ſuch common paſtures, and to the better manuring and cultivation of the arable lands in common fields, or otherwiſe, to which ſuch common paſtures may belong, if the ſame were fed with ſheep,) that it ſhall and may be lawful to and for the major part in number and value of the perſons having right of common in ſuch common paſtures, at any meeting to be held in purſuance of notice, in writing, under the hands of a major part of ſuch owners and occupiers of ſuch common paſtures, or perſons having right of common therein, to be affixed on the principal door of the pariſh church of the pariſh where ſuch common paſtures ſhall lie, or of the neareſt pariſh church where

ſuch lands ſhall lie in an extraparochial place, ten days at leaſt previous to ſuch meeting, ſpecifying the time and place, and intent of ſuch meeting, by writing under their hands, to alter and change the manner and cuſtom of feeding and depaſturing ſuch common paſtures, ſo far as inſtead of horſes, cows, and other cattle, to allow the ſame to be fed and depaſtured with ſheep, at the option of each perſon reſpectively having right of common; and to limit and ſtint the number of ſheep each ſuch perſon, having right of common in ſuch common paſtures, ſhall reſpectively feed and depaſture thereon, in due proportion to their reſpective ſtints or rights.

Rams not to remain upon waſtes from Aug. 25, to Nov. 25.

Sec. 21. (After taking notice that the improvement of the breed of ſheep is a matter of great national importance, and the turning of rams upon waſtes and open common fields at certain times of the year has been found to be very prejudicial,) that no ram ſhall be turned upon or be ſuffered to remain upon any waſtes or common fields, between the twenty-fifth day of Auguſt and the twenty-fifth day of November in every year.

Perſons formerly under diſability, under this act may ſign agreements.

Sec. 22. (After taking notice that ſeveral of the owners and proprietors of waſtes, commons, and common field lands, may, at the time of any meeting to be held in purſuance of this act, be incapable through various impediments, of entering into any of the agreements thereby authoriſed to be made, for the better ordering, fencing, cultivating, and improving, of common arable fields, waſtes, and commons of paſture, in this kingdom, without the aid and authority of parliament,) that it ſhall and may be lawful to and for the huſbands, guardians, truſtees, committees, or known agent or receiver of any owner and proprietor of waſtes, commons, and common field lands, and of any perſon having a right or intereſt therein, being under coverture, minors, lunatics, or beyond the ſeas, and for every or any of them for the time being; and alſo to and for all and every or any of the ſaid owners and occupiers, being tenants in tail, tenants by the courteſy of England, or tenants for life only, and to and for every or any of them reſpectively for the time being, to enter into, and ſign any agreement to be made in purſuance of this act.

Rectors or tithe owners, not to receive gratuity for letting tithes other than by

Sec. 23. That no rector or tithe owner, in right of his rectory, vicarage, or curacy, or the leſſee of either of them reſpectively, who ſhall agree for or let his tithes

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half-yearly or yearly payments.

All agreements made to be valid in law.

Sec. 24. That every agreement ſo entered into in purſuance of this act, ſhall be good, valid, and effectual in the law, for the purpoſes thereby intended, notwithſtanding the want of legal title in the ſaid owner or owners, or in the ſaid huſbands, guardians, truſtees, committees, agents, or receivers, or in the perſons acting as ſuch, or in the ſaid tenants in tail, tenants by the courteſy of England, or tenants for life only, any ſettlement or ſettlements, will or wills, to the contrary in anywiſe notwithſtanding.

Conſent of occupiers not to be valid, without a written authority under the hand of the proprietor.

Sec. 25. That no conſent of any occupier of lands in ſuch common arable fields, or of a ſeparate ſheep walk therein, to any ſuch firſt agreement, for the ordering, fencing, cultivating, and improving of ſuch common fields, to be made by the authority of or in purſuance of this act, ſhall be good and valid, unleſs ſuch occupier ſhall, at the time of entering into ſuch agreement produce a written authority for that purpoſe, under the hand of the owner or proprietor, guardian, or truſtee; or in caſe of ſuch owner not being a minor, and being in parts beyond the ſeas, of the known agent of ſuch owner.

Actions may be brought at Weſtminſter.

Sec. 26. That if any owner or occupier of any common field lands, or of any part thereof, for the better cultivation whereof any rules and regulations ſhall have been agreed upon, in purſuance of the powers and authorities given by this act, ſhall not conform to ſuch rules and regulations, or ſhall wilfully deviate therefrom in any reſpect whatſoever; that then, and in ſuch caſe, it ſhall and may be lawful to and for any owner or owners, or occupier or occupiers, of any part of ſuch common field lands, who may have been damnified by a breach of the regulations aforeſaid, to bring one or more action or actions of treſpaſs, or upon the caſe, in any of his Majeſty's Courts of Record at Weſtminſter againſt the perſon or perſons ſo offending; and if in any ſuch action, ſo to be brought as aforeſaid, a verdict ſhall be given for the plaintiff, or he ſhall recover judgment by default; that then, and in ſuch caſe, the party or parties ſo offending ſhall anſwer to the party grieved all ſuch damages as ſhall be recovered in ſuch action, together with double coſts of ſuit.

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Sect. 27. That nothing in this act contained ſhall prevent, or extend to prevent, any perſon or perſons from incloſing all or any part or parts of his, her, or their land, to and for his, her, or their own uſe or benefit, ſuch perſon or perſons having full power or right ſo to do.

No perſon is hereby prevented from incloſing his lands for his own uſe,

Sect. 28. Saving to the King, his heirs and ſucceſſors, and to all and every lord or lords, lady or ladies, of any manor or manors, and to all and every other perſon and perſons, bodies politic or corporate, his, her, and their heirs, ſucceſſors, executors, and adminiſtrators, (other than and except the reſpective perſons, their heirs, ſucceſſors, executors, and adminiſtrators, who may, in conſequence of this act being duly carried into execution, become ſubject to the proviſions and regulations thereby authoriſed to be made), all ſuch eſtate, intereſt, and rights, as they, every, or any of them, had or enjoyed in and over the ſaid common arable fields, waſtes, and commons of paſture, before the paſſing of this act, or could or might have had and enjoyed in caſe the ſame had not been made.

Saving all rights to his Majeſty, lords of manors, &c.

If the majority of commoners agree upon a bye-law for ſtopping a trench, being a nuiſance to the common, it ſhall bind all the commoners, though there be no cuſtom to ſupport it. *Moor*, 579.

Where, and in what Caſes Approvement may be made by the Lord; and how this Approvement muſt be.

As to the manner how the improvement muſt be; it muſt be divided by ſome incloſure or defence, ſo as it may be made ſeveral; for it is lawful for the tenant to put his cattle into the reſidue of the common; and if they ſtray into that part, whereof the approvement is made, in default of incloſure, he is no treſpaſſer. Now by the ſtatute of W. 2. if perſons unknown in the night, or otherwiſe, ſo ſecretly deſtroy the ditches, hedges, &c. ſo as the lord cannot know againſt whom to bring his aſſize, or other action; and the men of the towns next adjoining do not indict the miſdoers, theſe next towns ſhall be diſtrained to make the hedge or ditch at their own coſt, and yield damages to the lord; and they have a year and a day for the indicting of them; and by the indictment, the lord ſhall know againſt whom to bring his action; and if they do not, the lord ſhall bring his

How improvement muſt be made.

Statute of W. 2. c. 46, of prohibiting incloſures by night.

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An action on the caſe by commoner, digging of pits by the lord, no improvement.

The lord pleads in an action on the caſe by a commoner, for digging of pits, that he is lord of the ſoil, and that he digged coals, leaving ſufficient common, &c. *Per cur.* The lord may not dig pits, whereinto the beaſts of the commoner may fall; for the ſtatute intends other manner of improvement, i. e. by incloſure. *Sid. p.* 106. Goe and Cotler. 1 *Keb.* 453. *S. C.*

No improvement againſt a man's own grant.

One cannot improve againſt his own grant, though it be to a certain number. 1 *Keb.* 430.

The lord by the ſtatute of Mert. ought to leave ſufficient paſture for common, and egreſs and regreſs from the tenements to the paſture. So *per ſtat. W.* 2.

The part improved is diſcharged of common.

If the lord doth improve part of the common, he ſhall not have common in the reſidue of the land, for the lands improved; becauſe he cannot preſcribe for that which is ſo improved. 4 *Leon.* 44.

Of what Things or Commoning, Improvement ſhall be.

To what ſort of common the ſtatute extends, and to what not.

Neither the ſtatute of Merton nor the ſtatute of W. 2. do extend to any common, but to common appendant, or appurtenant to his tenement, and not to a common in groſs, to a certain number, or by grant. *Co. ſur ſtat. W.* 2. 46.

Five ſorts of improvements without leaving ſufficient common.

But there are five kinds of improvements, that both between lord and tenant, and neighbour and neighbour, may be done without leaving ſufficient common to them that have it, any thing in the ſtatute of Merton, or 42 W. 2. notwithſtanding. 1. Windmills. 2. A ſheep-houſe. 3. Cow-houſe. 4. Enlarging of a court neceſſary. Or, 5. Curtilage: theſe are but put for example, for the lord may erect an houſe for a beaſt-keeper, a dairy, or milk-houſe, &c.

Neceſſary enlargements *curtilagii* how to be underſtood.

But the word neceſſary muſt be applied to *curtilagii*; and it ſhall not be taken according to the quantity of the freehold he has there, but according to his perſonal eſtate or degree, and for his dwelling and abode; for if he has no freehold there in that town but his houſe only, yet may he make a neceſſary enlargement of his curtilage.

One incloſeth two acres of common (where were but three acres) to enlarge the curtilage of his houſe, and

becauſe it did not appear it was for his neceſſary reſidence, judgment was given that he may not incloſe. It is not for houſes of pleaſure or convenience; an hop-ground or park is not within this ſtatute. Judgment for the defendant on demurrer. *Sid.* 79. 1 *Keb.* 283, 314. Nevil and Hamerton. APPORTIONMENT.

A marſh in common to two vills between them and their tenants, by preſcription, for their ſheep being ſalt; *quære* if this may be approved, 1 *Keb.* 876. Pate and Brownlow's caſe. A marſh.

Remedy for the Commoner, if the Lord on Improvement leave not ſufficient Common.

He may have an aſſize; and if by the aſſize it ſhall be found that the plaintiff had not ſufficient ingreſs and regreſs, or not ſufficient paſture, then the plaintiff ſhall recover ſeiſin by the view of the jurors; ſo that by the diſcretion and oath of them, the plaintiff ſhall have ſufficient paſture, and ſufficient ingreſs and regreſs aſſigned to him, and that the diſſeiſors ſhall yield damages; or he may have treſpaſs; for many times he ſhall fail to have a writ of aſſize. Or if the lord do incloſe any part, and leave not ſufficient common in the reſidue, the commoner may break down the incloſure, becauſe it ſtandeth upon the ground which is in his common.

So it ſeems, the commoner in that caſe may have an action of treſpaſs, &c. againſt the lord or any other that either incloſes or ſurcharges the common. But in an action againſt the lord the plaintiff muſt particularly ſhew the ſurcharge. 2 *Mod.* 6, 7.

CHAP. VII.

OF APPORTIONMENT, EXTINGUISHMENT, SUSPENSION, REVIVER OF COMMON.

1. *Where, and what Common ſhall be apportioned.*

COMMON appendant is apportionable and ſeverable by the act of the party, but common appurtenant is not ſo: as if a man had common appendant in 4 acres belonging to twenty acres, if he ſell 10 of his acres, or buy Common appendant how apportionable.

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part of the 40 acres, the common may be divided and apportioned, *pro rata*, (if it had been common appurtenant it had been loſt.) So is Tirringham's caſe. If *A.* had common appendant to 20 acres of land, and enfeoffs *B.* of parcel of the 20 acres, to which, &c. this common ſhall be apportionable, and *B.* ſhall have common *pro rata*. And when part of the land to which the common is appendant, &c. is aliened, there every of them may preſcribe to have common for beaſts *levant* and *couchant* upon his lands. So if a commoner purchaſe a parcel of the land in which he hath common, yet the common ſhall be apportioned; but it is not ſo of common appurtenant or any other common. *Hob. p.* 25. 4 *Rep.* Tirringham's caſe, *Inſt.* 1. *p.* 122.

Common appurtenant not apportionable.

Now common is admeaſurable, according to the quantity and quality of the freehold, to which he claims to have common appendant. 37 *H.* 6. 34.

By a leaſe for years the common is not ſuſpended or diſcharged.

In a leaſe of a common, during the leaſe for years the common is not ſuſpended or diſcharged; for each of them ſhall have common rateable, and in ſuch a manner, that the land, in which there is right of common, &c. ſhall not be ſurcharged; and if ſo ſmall a parcel be demiſed, which will not keep one ox or a ſheep, then the common ſhall remain with the leſſor; ſo always as the land in which there is right of common, &c. be not ſurcharged. 13 *Rep.* 65, 66. Morris and Web's caſe, 2 *Brownl.* 298. Meſme caſe, and 1 *Brownl.* 180.

Difference between common appendant and in groſs, as to apportionment.

There is a difference between common appendant, which is of neceſſity, and common in groſs; for in the caſe of common appendant, if one tenant of the manor do purchaſe the ſeigniory, and then grants over the tenancy, the common which he had before ſhall be ſtill appendant; otherwiſe, of a common in groſs. *Owen. p.* 122.

Common appurtenant, not apportionable by purchaſe of part of the land.

Common appurtenant is againſt common right, and therefore not apportionable. 4 *Rep.* Tirringham's caſe. And therefore,

If a commoner purchaſe parcel of the land in which there is right of common, all the common is extinct. 8 *Rep.* 78.

But that and appendant are apportionable by ſale of part of the land.

But common appurtenant and common appendant ſhall be apportioned by alienation, or ſale of part of the land, to which common is appurtenant or appendant; ſo is *Hob.* 235. where one had a common appurtenant to 10 acres, for all his beaſts *levant* and *couchant* upon the ſame, and ſells part of it; it was adjudged that the common

ſhould be apportioned, and every one ſhould have common for his beaſts *levant* and *couchant* upon his part; for there are things entire in ſeveral degrees, ſome that cannot be divided by any act of the parties, as warranty, conditions, &c. which yet by act in law are divided. But the caſe of common is not ſo ſtrict an entirety; and the miſchief of the generality of the caſe, requires an extenſion for the common good. And ſo is Wiat Wild's caſe in *Co.* 8 *Rep.* *J. S.* ſeiſed of one meſſuage and 40 acres, time out of memory, had common of paſture in 200 acres, in the ſaid manor of *C. J. S.* enfeoffs *J. B.* of 5 acres in fee, *J. B.* ſhall have common of paſture in the ſaid 200 acres, for all his commonable cattle *levant* and *couchant* upon the ſaid 5 acres of land. So that the rule is, by purchaſe of part of the land in which there is right of common, the common is all deſtroyed; but by alienation of part of the land commonable, to which common is appendant or appurtenant, the common is apportionable. *Hob.* 235. *Anonymous*, 8 *Rep.* 59. Wiat Wild's caſe.

It is ſeverable.

It appears by the preſcription in Wild's caſe, that the ſaid common is ſeverable, for the preſcription is to have common in the land, in which there is right of common to be taken by the mouths of the beaſts, which are *levant* and *couchant* upon the land, to which the common is appendant or appurtenant, and this extends to all and every parcel, and cannot be more damage or charge to the tenant of the lands in which the right of common is, after the ſeverance, than was before; for no other beaſts may depaſture there, except thoſe which are *levant* and *couchant* upon the land, to which the common is appendant or appurtenant. But if he who has common purchaſe parcel of the land in which there is right of common, all his common is extinct, or if he take a leaſe of part of the land, all is ſuſpended; becauſe it was the commoner's folly to intermeddle with part of the land to which the common was appendant or appurtenant, which belongs not to him; but when the commoner intermeddles but only with his own lands, by the alienation of it, this ſhall not turn to his prejudice in ſuch a caſe; for this is not againſt any rule in law, as the other caſe is, when he purchaſeth parcel of the land, in which there is right of common, becauſe his common appurtenant is againſt common right, and he cannot common in his own land which he has purchaſed. And if the law ſhould be

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otherwiſe, all the common appurtenant in England would be deſtroyed; for no land continues ſo entirely as it was *ab initio*; but for payment of debts, advancement of daughters, part may be ſevered; the alienee therefore ſhall have common. Wild's caſe.

Common appurtenant ſeverable from the manor.

Common appurtenant may be ſevered from the manor, eſpecially when it is granted with parcel of the manor. *Jones's Rep.* 397.

Fold-courſe.

A fold-courſe for 300 ſheep may be appurtenant to a manor, and this without ſaying *levant* and *couchant*. And if the lord grant or leaſe to another parcel of the manor, as divers acres, parcel of the ſaid manor, with the ſaid fold-courſe, this ſhall paſs as appurtenant to the ſaid acres. For it is not neceſſary for them to be *levant* and *couchant* on the manor, and it is no prejudice to the owner of the land, where the common is to be taken. 1 *Roll. Abr.* 232. Day and Spooner's caſe.

Where notwithſtanding a deſcent of part of the land to a commoner, it ſhall remain, and where it ſhall be apportioned.

A. hath common of paſture without number in 20 acres of land, and 10 of theſe acres deſcend to *A.* the common without number is entire and uncertain, and ſhall not be apportioned but remain. But if it had been common certain, (as for 10 beaſts) in this caſe it ſhall be apportioned. 1 *Inſt.* 149. *a.* So is *Cro. Car.* 432. Common certain may well be divided, or annexed to part of the manor: and ſo may a fold-courſe, which is in the nature of a common certain; and there cannot be any prejudice to the tertenants, for they cannot be charged with more than they were before.

Common pro rata.

If a man ſeiſed of 60 acres of land, preſcribes to have common in other lands for all his beaſts *levant* and *couchant* upon it, and he makes a feoffment in fee of 5 of theſe acres, his feoffee ſhall have common apportionable *pro rata*; for the common is joint and ſeveral, and no ſurcharge or wrong by this is made to the tenant. 1 *Roll. Abr.* 235. Morton and Wood's caſe.

By leaſe of land common pro rata.

If one preſcribe to have common to two yard-lands, for four other beaſts, four horſes, &c. after ſeverance of the common, and when the land is not ſowed to have common all the year; and after he leaſeth one of the yard lands for years, the leſſee ſhall have this common *pro rata*, 1 *Roll. Abr.* 235. See above.

Common paſſeth by the words *cum pertinentiis*.

If he which hath common appurtenant to land, demiſeth parcel of the land to another, the leſſee ſhall have common for the beaſts *levant* and *couchant*. Wildman's caſe, 8 *R.*

By feoffment of parcel of land *cum pertin'* without deed, the common paſſeth as appurtenant; and ſo of part. *Jones's Rep.* 397. Sacheverel's caſe. EXTINGUISHMENT.

Upon grant of part of the land over, the common is not extinct, but apportioned. *Cro. Car.* 482.

2. *Where Common ſhall be extinct by Purchaſe of the Land, or Part of it, or by Alienation of the Land or Part of it; and where it ſhall be ſuſpended.*

Unity of poſſeſſion of the entire land to which common is appendant, and of the entire land in which there is common, makes an extinguiſhment of common appendant, as Bradſhaw's caſe, in Tirringham's caſe. 4 *Rep.* 38. *a.* Tirringham's caſe. By purchaſe of parcel of the land.

The rule is, "Unity of poſſeſſion of ſo high and perdurable eſtate, of the thing claimed as of the land out of which it is claimed, by preſcription, ſhall deſtroy the preſcription;" becauſe it is an interruption in the right; but preſcription or cuſtom cannot be loſt by the interruption of the poſſeſſion for 10 or 20 years.

Preſcription is in general gone by unity of poſſeſſion.

But ſhack common ſhall not be extinct by unity of poſſeſſion. See below.

By purchaſe of part of the land in which there is common, common appurtenant is all deſtroyed; but by alienation of part of the land to which it is appurtenant, the common is apportionable. See above, 97. And if a man make a feoffment of land in which he had common appendant, this ſhall extinguiſh the common perpetually. If he which has common appendant purchaſe the land out of which this iſſues, in fee, the common is extinct by this. Tirringham's caſe, and Wiat Wild's caſe. 1 *Roll. Abr* 932. Cateſby's caſe, *Rol.* 935.

And if ſeveral perſons be ſeiſed of ſeveral parts of a common, and a commoner purchaſe the inheritance of one part, his entire common is extinct. 1 *And.* 159.

If he which had common in groſs purchaſe the land out of which this iſſues, the common is extinct. 7 *H.* 6. 3. Common in groſs.

If the lord of the manor who had common *de jure* in his waſtes, alien the waſtes, this ſhall extinguiſh his common. 18 *Ed.* 3. 44. 18 *Aſſ. p.* 4.

If a man be ſeiſed of land to which common is appendant, and is diſſeiſed of the common, upon which he

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Shack common. Shack common (the nature of it, ſee above) or mutual common, in regard that I have common in your ground, that you ſhall have common in mine, ſhall not be extinguiſhed, by the unity of the poſſeſſion, for the neceſſity of the public good to uſe without incloſure. 1 *Roll. Abr.* 935. Biſhop of London's caſe.

Eſtovers. If the owner deſtroys the houſe, the eſtovers is gone, for the preſcription is annexed to the houſe. *Winch. p.* 45.

One had common in a great field wherein many men had land; he purchaſed an acre from one of them: it was adjudged, that all his common was extinct. 1 *And.* 159. *Cro. Eliz.* 594. 1 *Leon, p.* 43. caſe 56. Kimton and Bellamy.

By incloſure. If a commoner incloſe part of the waſte out of which he had common iſſuing, this ſuſpends his common. *Paſch.* 1 *Jac.* Bradſhaw's caſe.

Purchaſe of the approvement doth not extinguiſh common. If the commoner purchaſe a part approved, his common ſhall not be extinct in the reſidue. As one had common appendant to his tenement, in a great waſte, and the lord improves part of the waſte, leaving ſufficient common in the waſte; and after he enfeoffs the commoner of the improvement; this does not extinguiſh his common in the reſidue. *Dyer, f.* 339. *pl.* 45.

Extinct by a releaſe of common in part of the land. By a releaſe of common in part of the land, it is extinct in the whole; for the common is entire through the whole land; wherefore a releaſe in part ſhall diſcharge the whole (*a*) *Cro. Eliz.* 593. Rotheran v. Green. 2 *Anderſon*, 89. Meſme caſe. 4 *Co.* 37. 8 *Ibid.* 136. *Shew.* 350. 4 *Mod.* 365.

Extinct in the King's hands. Copyholder had common in the King's waſte in a foreſt, and in the waſte of other freeholders, and after the manor comes to the King by diſſolution, and he grants the manor; the common in the land of the freeholders is not extinct, but in the King's waſte it is. *Jones's Rep.* 349.

Common pur cauſe de vicinage. In common pur cauſe de vicinage, if one incloſe part it is an extinguiſhment of all the common. 1 *Brownl.* 174. Bacon and Palmer's caſe.

(*a*) Walmſley held the common was not gone for the reſidue, becauſe this releaſe went in benefit of the tertenant, and is *quaſi* an improvement.

If common appendant to abbey lands were perpetually ſuſpended before the ſtatute, it ſhall be perpetually extinct afterwards. 2 *Roll. Rep.* 257. EXTINGUISHMENT.

Suſpenſion of common, no plea to an action of debt for rent. *Vide infra* tit. *Pleadings*. Suſpenſion.

3. *Of Common being loſt by the Extinguiſhment of Copyhold Eſtates.*

Common which was firſt gained by cuſtom, and annexed to the cuſtomary eſtate, is loſt when the copyhold is extinct and infranchiſed; for the common is not in its own nature incident to a copyhold eſtate, but a collateral intereſt gained by uſage. Therefore a copyholder of a meſſuage and two acres of land for life, had common in the lord's waſte: the lord grants and confirms the ſaid copyhold meſſuage and lands *cum pertinentiis*, to him and his heirs. The queſtion was, whether he ſhould have common ſtill? *Per totam Cur.* He ſhould not. Cuſtom hath annexed the common to his cuſtomary eſtate, which being infranchiſed, determined and deſtroyed by his own act, in making it a freehold, the common is alſo deſtroyed, and cannot continue without ſpecial words. And the general words *cum pertinentiis*, will not help, becauſe the common is no appurtenant to the freehold granted by the lord, to which theſe words muſt be ſuppoſed to refer. *Yelv.* p. 190. *Cro. Jac.* 252. *Hob.* 190. So was the caſe of Forth and Ward, where a copyholder had uſed to take eſtovers to repair his hedges; and the lord granted to him the freehold of the copyhold by the words of "Grant unto him all the lands, tenements and hereditaments thereunto appertaining, and therewith uſed and occupied:" it was reſolved he ſhould not have common in the land of the lord. 2 *Brownl.* 209. Marſham and Hunter's caſe, *Moore* 866. Forth and Ward. The words *cum pertinentiis* do not create a common. A copyholder claims common in another man's land, and the lord enfeoffs the copyholder of his copyhold land; he hath now loſt his common; but if a copyholder hath common in the lord's waſte, and the lord enfeoffs him of the copyhold with all his commons; the common is not gone. 1 *Brownl.* 173. Lee and Edward's caſe. Note, the words "And all paſtures and commons whatſoever" to the ſaid meſſuage or tenement belonging, or uſed, or

Where copyhold is extinct common is loſt, though the words cum pertinentiis be in the grant.

Of common in reference to copyhold.

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demiſed with the ſame; and it is intent, that a like common ſhall be granted. 2 *Anderſon* 168. Worley's caſe.

But in other caſes a diſtinction is taken where the waſtes in which the copyholder has common are within the manor and where not; for though the common will become extinct by infranchiſement when the waſtes are within the manor, yet it will not, it is ſaid, when ſuch waſtes are out of the manor. *Salk.* 170. *Pl.* 3. 364. *Pl.* 5. Crowther v. Oldfield. 2 *Ld. Raym.* 1225.

But this diſtinction is now immaterial, as in either caſe relief may now be had in equity, where the ſame right of common will be decreed the copyholder after infranchiſement as he had before. 6 *Mod.* 19. 2 *Vern.* 250.

If *A.* has common in the lands of *B.* as appurtenant to a certain meſſuage and 20 acres of land, and *B.* enfeoffs *A.* of the lands in which, &c. whereby the common is extinguiſhed, and afterwards *A.* leaſes to *B.* the ſaid meſſuage, and 20 acres of land, with all commons, profits and commodities thereunto belonging, *vel occupat. vel uſitat. cum pred. meſſuagio*, this is a good grant of a new common for the time. For though it were not common while in the hands of the leſſor, yet it is now granted *quaſi common* to be uſed with the meſſuage, land, &c. And although it be not the ſame common as was uſed before, yet it is the like common. *Trin.* 39 *El.* Bradſhaw v. Eyre. *Cro. El.* 570. See alſo *Cro. El.* 794. 2 *And.* 168.

Common of turbary.

The queſtion upon a ſpecial verdict was, when the lord of the manor is ſeiſed of a waſte, and a tenant of an ancient tenement preſcribes to have common in the waſte of the lord; afterwards the tenement is ſevered from the manor, and granted for a term to the defendant, with all commons appurtenant to the ſaid meſſuage and cloſe, whether this common that was before belonging to this ancient tenement, ſhall paſs to the grantee? And it was agreed, *Per Cur.* that if a copyholder doth purchaſe the inheritance of his copyhold, and afterwards grants this with all commons belonging to the ſame; the common that was before uſed with the copyhold ſhall paſs to the grantee.

Common of copyholders extinct.

One had two manors, viz. Dale and Sale: the copyholders of D. have uſually common in the manor of S. *et contra.* Afterwards the lord ſells both the manors. The copyholders of the manor of D. die, and others

the common is for a number certain; and by the preſcription the ſheep are not to be *levant* and *couchant* upon the manor, and ſo may be ſevered from the manor without prejudice to the owner of the land. *Cro. Jac.* p. 15. Drury and Kent's caſe. 1 *Roll. Abr.* 232, 401, 402, Spooner and Day's caſe, 232. *Cro. Car.* 542.

2. *By what Words Common ſhall paſs, and that in reſpect of Ancient Common, or a Grant de novo.*

An ancient common may be *in eſſe*, or extinct,

As to common *in eſſe*, how and by what words it ſhall paſs; and of the expoſition and extent of the words.

Common ſhall paſs with the words *cum pertinentiis*, (with the appurtenances,) But where a common is extinct, there it ſhall not paſs, or be revived by the words *cum pertinentiis*, as in Marſham and Hunter's caſe. A copyholder for life had common in the lord's waſte; the lord grants and confirms the ſaid copyhold, meſſuage and land *cum pertinentiis*, to him and his heirs. *Per Cur.* This purchaſer ſhall not have common there as the copyholder had: ſee above in the ſect. before. So Forth and Ward's caſe, a copyholder had uſed to take eſtovers to repair his hedges; and the lord granted to him the freehold of the copyhold, by the words of "all the lands and tenements thereto appertaining, and therewith uſed and occupied." *Per Cur.* He ſhall not have common in the land of the lord. So in the principal caſe, for the words *cum pertinentiis* ſhall not create a common: and the defendant juſtified in treſpaſs for uſing the common, by reaſon of confirmation, and adjudged againſt him on a demurrer. But it is ſaid it was agreed in Grymes and Peacock's caſe. 1 *Bulſtr.* 17, 18. That if a copyholder does purchaſe the inheritance of his copyhold, and afterwards grants this with all commons belonging to the ſame; yet the common, which was before uſed with the copyhold, ſhall paſs to the grantee. Though I conceive the Reporter is miſtaken in that point; but the caſe fell off, becauſe the pleading was by a leſſee, with an *uſſtatum eſt*, which cannot be good, as annexed to the eſtate of the termor. See above. Brownlow ſaith, the judges gave not any abſolute opinion in the firſt point: if there be a common appurtenant to a copyhold tenement, and the lord makes a feoffment of the tenement with all profits,

Where *cum pertinentiis* will carry the common without ſpecial words or not.

Copyhold.

How in caſe of copyhold.

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Common may paſs by the name of tenements and hereditaments.

A common may be granted, and paſs by the name of tenements and hereditaments; and ſhall be conſtrued as a thing occupied, and enjoyed with, &c. 8 *Rep.* Sir H. Finche's caſe.

If part of the land is conveyed, to which common is appurtenant, and not the intire; yet common ſhall paſs by the words *cum pertinentiis*, and ſhall be apportioned, and may paſs by a feoffment, together with the ſaid tenements. See above. *Cro. Car.* 482. Sacheverel and Porter's caſe.

What words amount to a grant of the common.

So commoner for an houſe and 20 acres of land, had common in all the lands of *B.* and he infeoffs the ſaid *B.* of the houſe and land to which, &c. *B.* afterwards lets to *J. S.* the ſaid houſe and land, with all commons, profits, and commodities appertaining, or occupied or uſed with the ſaid meſſuage. *Per Cur.* This common appurtenant (and ſo it is of common appendant) is extinct by unity of poſſeſſion: but the Court held, that by the words of the leaſe of all commons, profits, &c. occupied, or uſed *cum meſſuagio*, &c. it is a good grant of a new common for the time; for though it were not a common in the hands of the feoffor, yet it is *quaſi* common uſed therewith. And though it be not the ſame common it was before, yet it is the like common: but becauſe there was not a ſufficient averment, that this common was uſed by the leſſor at the time of the leaſe, it paſſed not. Much like this caſe is that of Worley and Kingſmill, a copyholder of a manor, which had common by preſcription in 60 acres, parcel of the demeſnes of the manor eſcheated, and the lord by deed granted it to another in tail by the deſcription of all commons to the ſaid meſſuage belonging or uſed therewith. *Per Cur.* The grantee in tail ſhall have ſuch common as the copyholder had; though the ancient common which was by preſcription, is determined by unity of poſſeſſion in the lord. But the grant ſhall enure as a new grant of the ſame common. *Cro. Eliz.* 794. Worley and Kingſmill's caſe, 2 *And.* 169. Meſme caſe.

Pleading. Copyhold.

What words enure as a new grant, the common being extinct.

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But where Sir *R. G.* was ſeiſed of divers tenements called Hingell-Hall in *L.* and of a moor called Kingſly-Moor in *D.* and the tenants of Sir *R. G.* have uſed to have common in the ſaid moor; and Sir *R. G.* being ſeiſed, did demiſe the ſaid tenements to *K.* for her jointure by theſe words, by the name of Hingell-Hall, and certain land, meadow and paſture in certainty, and with all lands, tenements and hereditaments to that belonging, or with that occupied, or enjoyed, now, or late in the tenure of one *N.* and *N.* was tenant of the ſaid premiſes, and had common in Kingſly-Moor. The queſtion was, if *K.* by this demiſe ſhall have common in Kingſly-Moor, or not? If it were taken to be a common, it did paſs. But by Coke, this is only a feeding, and not an hereditament; and if ſo, it ſhall be intended the like feeding that the tenant hath. *Quære.* 2 *Brownl.* 52. Hargrave's caſe.

With all lands, tenements and hereditaments is common paſture.

One grants to a man and his heirs common as appurtenant to his manor of *F.* to common in ſuch a moor, &c. by this grant the grantee ſhall have common appurtenant to this manor; and if he makes a feoffment in fee, or for term of life, of the manor, the feoffee, or leſſee, ſhall have this common. So it is of common of eſtovers or turbary. Note, common appurtenant to a manor, may be by grant by deed, ſince time of memory; and this as well for beaſts certain, as beaſts without number. So is *Rolle, Fitz. N. B.* 180. *n.*

Grant of common appurtenant to a manor.

Common appurtenant may be by grant, by deed ſince time of memory.

If at this day a grant *de novo* be made of common of paſture for beaſts *levant* and *couchant* on his manor of Dale, or common of eſtovers, or turbary in fee, to be uſed or ſpent within his manor; theſe are common appurtenant, and will paſs by grant of the manor. 1 *Inſt.* 121. *b.*

Grant *de novo* of common will paſs by grant of the manor.

But if *A.* ſeiſed in fee of Black Acre, and White Acre, grants Black Acre to *C.* with common for the beaſts *levant* and *couchant* upon *W.* Acre, this is not good without deed. 2 *Roll. Abr.* 63. Tanner and Hobb's caſe.

If *A.* being ſeiſed of 100 acres of land, to which common for beaſts *levant* and *couchant* upon the land is appurtenant, and by grant within the time of memory, grants 10 of theſe acres only, without ſaying *cum pertinentiis*; yet a proportionable common for beaſts *levant* and *couchant* upon theſe 10 acres ſhall paſs, inaſmuch as it is appurtenant to the ſaid acres, and the common is to be

Appurtenant of common appurtenant *de novo*.

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By the grant of lands and tenements, and paſtures, common in groſs ſhall not paſs. Fine.

By the grant of all lands and tenements common in groſs ſhall not paſs; and common in groſs ſhall not paſs by the grant of all his paſtures. 2 *Roll. Abr.* 57.

3. *The Expoſition and Extent of Grants of Common.*

One ſeiſed of the manor of *C.* and of 42 acres, parcel of the ſaid manor (where the treſpaſs was.) and of a meſſuage, and two yard-lands parcel of the ſaid manor, levied a fine of the ſaid meſſuage, and two yard-lands to the defendant, and granted them to the defendant and his heirs; and further, by the ſaid fine granted to him common for 4 horſes, 5 beaſts, and 200 ſheep in the ſaid manor and lands in *C.* This plea is good, though he doth not plead that it was waſte or common. For by the plea (as the fine is) he may claim common in any part of the manor; for there is not any reſtraint as to the waſte or common. *Cro. Car.* 599. Strange's caſe.

Grant of common through all his manor, extends not to garden, nor to beaſts not commonable.

If a man grant common to another for his beaſts through all the manor; yet he may not common in the garden of the grantor parcel of the manor, but only in ſuch place where a man of common right ought to common, nor in land ſowed, nor with beaſts not commonable, 9 *H.* 6. 36. 3 *Leon.* 250. *Finch.* 158.

Grant of common expreſſeth not any place certain.

If a man grants land to one with right of common in all his lands, &c. and does not expreſs any place in certain; he ſhall have common in all lands which he had at the time of the grant: but if I grant common to another for years, and do not declare in what place he ſhall have it, it is void. 1 *Bulſtr.* p. 18. *Fitz. N. B.* 180.

Grant of common to a man wherever his cattle ſhall go, how it ſhall be expounded. 6 *Rep.* 64. 2 *Rep.* 32.

If a man grant common newly created, whenever his cattle ſhall go in, the grantee ſhall not have common there, but in this very manner. 1 *Rep.* 87. *a.* in Corbet's caſe.

A man grants common newly created wherever his cattle ſhall go; this is the form of that gift, and the grantee ſhall have common there, but in this manner, as it is here expreſſed.

If a man grant to me common for my beaſts wherever my cattle may go, if the beaſts of the grantor never depaſtured in any place before the grant, or at the time of the grant, or after, the grantee ſhall not have any benefit

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by the grant. But upon ſuch a grant, or after, the grantee ſhall not have any benefit by the grant. But upon ſuch a grant of common, if the grantor depaſtured his beaſts at the time of the grant, or after, in any place, the grantor may common there alſo. 9 *H.* 6. 36.

If a man grant common to another wherever his cattle ſhall ſtray, and after he occupy and manure 100 acres of land with his beaſts; and after he is ſo poor that he has not any beaſts; yet the grantee ſhall have common in the 100 acres. Yet it is ſaid in *Latch.* in Whitton and Weſton's caſe, (in the argument of that caſe), if a man grant common whenever his cattle ſhall go there, and after the grantor had no beaſts, the grantee ſhall not have common, becauſe the time that the grantor had common is material. *Latch. p.* 90.

And upon ſuch grant of common wherever the cattle of the grantor ſhall go, if the grantee put in his beaſts into his garden or corn, the grantee may put in his beaſts there alſo. 9 *H.* 6. 36.

But in caſe of ſuch a grant of common, if the grantor die; it is made a doubt in that book, if the grantee ſhall have common after his death.

Averment in pleading.

Now in the grant of common, when and wherever his cattle ſhall go; he ought to aver in pleading, that the cattle of the grantor went in the ſame place. Juſtice Berkley held the clauſe of wherever, &c. is not good, becauſe it reſtrains all the effect of the grant; for if the grantor will not put in his cattle, he ſhall never have common. But it was anſwered, that expreſs agreement ſuperſedes the law. Therefore, he that grants common wherever his cattle ſhall go, may till the land, or let it lie freſh, and the grantee has no remedy. *Cro. Car.* 599. Stringer's caſe, *Hob. p.* 40.

Grantee of a common without number muſt leave ſufficient common for the grantor.

If a man grant common without number, the grantee may not put in ſo many beaſts, but ſo that the grantor may have ſufficient common in the ſaid land. 12 *H.* 8. 2.

Common for all manner of beaſts, to what beaſt it extends, or not.

If a man grant common for all manner of beaſts, he ſhall not have common for pigs and goats; yet if a man grant common for all manner of beaſts, except goats, he ſhall have common for hogs, becauſ of the particular exception. 2 *Roll. Rep.* 280.

The effect of a particular exception in a grant.

Note, One cannot improve againſt his own grant, though it be to a certain number. 1 *Keb.* 430.

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Where it will not paſs without deed.

A grant of land with common, or eſtovers to be burnt: if he let the land, the common or eſtovers will not paſs without deed, and expreſs words therein, becauſe they be profits. *Aliter* of a way. *Cro. Bac.* 190. in Bendly and Brook's caſe.

4. In what Caſes Common will paſs without Deed.

As to common paſſing with the grant of the land to which it is appurtenant, &c.

Paſs without deed as appurtenant to land, though not created without deed.

A common ſhall paſs without deed as appurtenant to land, though it cannot be created without deed. Sacheverel and Porter.

A common paſſeth not without deed, becauſe it lies in grant, and not in manual occupation, i. e. it may not be created without deed. *Dr.* and *Stud. fo.* 18. *a.*

Grant of common *de novo* without deed, not good.

If *A.* ſeiſed in fee of Black Acre and White Acre, grants Black Acre to *C.* with common for the beaſts *levant* and *couchant* on White Acre; this is not good without deed. 2 *Roll Abr.* 63. Tanner and Hobb's caſe.

Difference between grant of common and grant of paſtures.

If *A.* ſeiſed of land in fee, grants the paſture of the land to *B.* for years, and *B.* licenſeth *C.* to put in his beaſts; this leaſe of paſture is good without deed, and the licenſe alſo. For this is a leaſe of the land to paſture, and not like to common of paſture. Otherwiſe, had it been if he had granted paſture for certain beaſts. Mountjoy and Tierdrue, 2 *Roll. Abr.* 62.

Where they ſhall paſs without attornment.

If a man who had common of paſture, or eſtovers to a certain number, grant them to another, they ſhall paſs without attornment. Grantee of a common may grant it over, before any ſeiſin by the mouths of his beaſts, becauſe it is not to be taken by the hands of the grantee, but by the mouths of the cattle. 31 *H.* 8. 151. 2 *Roll. Abr.* 47.

Where a grant of common ſhall be good by relation to a precedent bargainee or not.

If a man bargain and ſell Black Acre to *B*, and after, before the deed enrolled, by another deed grants common to the ſaid *B.* for all his beaſts which ſhall manure and depaſture the ſaid Black Acre, which he had bargained and ſold to the ſaid *B.* wherein he had mentioned it to be bargained and ſold; and after the deed is enrolled: this is a good common appurtenant to the ſaid Black Acre, although the grantee had nothing in Black Acre at the time of the grant; and although it be admitted, that this ſhall not relate to ſettle the eſtate in him, *ab initio*, inaſmuch as it had reference to the bargain and ſale, and

to the eſtate, which he ſhould have by force of this. 1 *Roll. Abr.* 399. Gawen and Stacy's caſe. GRANT.

So if a man grant common to another, for all the beaſts which ſhall be *levant* and *couchant* upon the land, which he ſhall purchaſe within a month after, and after he purchaſe certain land, this is a good common appurtenant to this land, although he had nothing in it at the time of the grant, foraſmuch as the grant had reference to that which he ſhall purchaſe, and it is not neceſſary that he ſhould have the land at the time of the grant. 1 *Roll. Abr.* 400. Gawen and Stacy's caſe. Though the grantor had nothing in the land in which, &c. at the time of the grant.

So if a man bargain and ſell Black Acre to *B.* and after, before the deed enrolled, by another deed grants common to the ſaid *B.* for all his beaſts, which ſhould manure and depaſture the ſaid Black Acre, and after the deed is enrolled, this ſhall be good common appurtenant to the ſaid Black Acre, although the grant had not any reference to the ſaid bargain and ſale, inaſmuch as the grantee had a poſſibility, and an inception of an eſtate, and uſe in the acre at the time of the grant; and it ſeems, this ſhall ſo relate to the poſſeſſion as ſufficiently to ſupport this grant; for there needs not ſo full an intereſt in this land, to annex the common to it. See below. And though the grant had not any reference to the bargain; if there were an inception of the eſtate, it ſhall ſupport the grant.

But if the grant had no reference to any future purchaſe; as if a man grant to *B.* common for all his beaſts that ſhall manure Black Acre, where he had nothing in Black Acre, and after he purchaſeth Black Acre, this grant of common is not good, upon a contingency, (viz.) if he purchaſe the land. Though I conceive the law in this caſe to be otherwiſe. For it may be good by way of covenant, but not to paſs an intereſt. See below. A grant that veſts merely in contingency not good.

One that had common of paſture cannot licenſe another to feed there, with ſuch a number of beaſts, without deed; but after verdict it ſhall be aided; for it ſhall be intended a good licence by deed, when the defendant took iſſue upon another point, (viz.) the cuſtom. *Cro. Jac.* 575. Monk and Butler's caſe. 2 *Saund.* 326, 327. in Hutchins's caſe. 2 *Show. c.* 81. Licence cannot be without deed.

One joint-tenant grants common to his companion *A.* for his own proper beaſts. It is a *quære* in 1 *Keb.* whether it be good, and if *A.* may put in ſuch beaſts whereof he is joint-tenant, or tenant in common with another? 2 *Keb.* 795. Grants of common for his own proper beaſts, what beaſts he may put in or not.

If *A.* ſeiſed of land in fee, grants the paſture of the land

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He who claims common for beasts *levant* and *couchant*, may not give licence to a stranger to put in his beasts, for that would be a wrong to the owner of the soil by a surcharge of common; and he who has common for 20 beasts certain, may not license another to put in the same number, *a fortiori* where they have common for no certain number. Monk and Butler's case.

CHAP. IX.

OF DISTURBANCE OF COMMON, AND THE REMEDIES.

DISTURBANCE of common is where any act is done by which the right of another to his common is incommoded or diminished. 3 *Blac. Com.* 237. Mary's case, 9 *Co.* 112.

This may happen in many of the cases which we have already enumerated, as where one who has no right of common, puts his cattle upon the land, and thereby robs the cattle of the commoners of their respective shares of the pasture; or if one who hath a right of common puts in cattle which are not commonable, as hogs and goats, which amounts to the same inconvenience. See above, p. 73.

Surcharging. Another disturbance of common is by surcharging it, or putting more cattle therein than the pasture and the herbage will sustain, or the party has a right to do; in this case he that surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. 3 *Blac. Com.* 238. *Blac. Rep.* 673, 817.

This injury can properly happen only where the common is appendant or appurtenant, and of course limitable by law, or where, when in gross, it is expressly limited and certain; for where a man has common in gross, without number, or without stint, he cannot be a surcharger. *Ibid.*

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However, where a man is ſaid to have common without ſtint, ſtill there muſt be left ſufficient for the lord's own beaſts. 1 *Roll. Ab.* 399. For the law will not ſuppoſe, that at the original grant of the common, the lord meant to exclude himſelf (*a*). *Ibid.* And ſee How v. Strode. 2 *Wilſ.* 869.

In caſe of a ſurcharge of common, it need not be ſhewn that the commoner actually turned in any cattle at the time of the ſurcharge, but only that he could not enjoy his common ſo beneficially as he ought. Wells v. Watkins. 2 *Blac. Rep.* 1233. And ſee *Wilſ.* 458. *Burr.* 320. *Ibid.* 2430. *Wilſ.* 126.

Incloſure.

There is yet another diſturbance of common, where the owner of the land, or other perſon ſo incloſes, or otherwiſe obſtructs it, that the commoner is precluded from enjoying the benefit to which he is by law entitled. 3 *Blac. Com.* 240.

This may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the ſoil of the common. *Ibid.* and *Cro. Eliz.* 198.

Or it may be done by erecting a warren therein, and ſtocking it with rabbits in ſuch quantities that they devour the whole herbage, and thereby deſtroy the common (*a*) *Ibid.* and *Cro. Jac.* 195.

2. *Remedy of the Commoner in caſe of Infringement of right of Common.*

Remedy of commoner againſt the lord or owner of the ſoil.

A commoner cannot deſtroy or drive away conies feeding upon the common, nor deſtroy their burrows; but reſort for a remedy to an action. Bellow v. Langdon, 1 *Bur.* 266. Cooper v. Marſhall. 1 *Bur.* 259. 2 *Wilſ.* 51. *Roll. Ab.* 90, 405. *pl.* 2. *Cro. Eliz.* 876. *Cro. Bac.* 195. 229. Sadgrove v. Kirby. 6 *Term. Rep.* 483.

Nor if the lord of a manor plant trees upon a common, can a commoner abate them. Kirby v. Sadgrove. 1 *Pul.* and *Boſan.* 3.

Commoner may have an action on the caſe againſt the lord for digging trenches.

Treſpaſs is brought againſt a commoner. He juſtifies by filling up trenches made by the lord. Per Wyndham, he may fill them up. Per Kelynge, he cannot, but where a ſtranger digs: but he may have an action on the

(*a*) For the remedies for theſe injuries, ſee *poſt* and 3 *Blac. Com.* 238, 240.

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caſe againſt the lord; the reaſon why he cannot fill up a ditch is, becauſe the ſoil is intermeddled with. 1 *Keb.* 884, 936. Howard and Spencer.

Nor, as it has been held, can a commoner diſtrain or chaſe out the cattle of the lord or tertenant damage feaſant. 2 *Leon.* 203. *Yelv.* 404. 129. *Cro. Jac.* 208. *Brownl.* 187. *Godb.* 182.

For if the lord ſurcharge the common, the proper remedy is an action on the caſe. 9 *Co.* 112. *Fitz. N. B.* 125. *Lutw.* 107. 2 *Vern.* 116. Cooper v. Marſhall, 1 *Burr.* 260.

But in other caſes, it has been holden, that if the lord put in his cattle when it ought by cuſtom to lie freſh and haimed, the commoner may take the cattle damage feaſant. Trulock v. White, *Roll. Abr.* 405, 406. 4 *Bur.* 2430.

And ſo where the lord is by the cuſtom ſtinted to a certain number of cattle, he puts in more, the commoner may diſtrain the overplus. Kenrick and Pargiter. *Yelv.* 129. (*a*). *Cro. Jac.* 208. *Brownl.* 187. 4 *Bur.* 2429, 2430. 2 *Roll.* 267.

Diſtrain damage-feaſant.

If one who has no right of common does put his cattle upon the common, he who is a commoner may take the cattle damage-feaſant upon the common; and it is not neceſſary for him to aver, that he hath damage by them, for he hath an intereſt, and that doth authoriſe him to remove the nuiſance. *Style* 482. Bronge and More's caſe.

Remedy of commoner againſt other commoners.

But one commoner cannot diſtrain the cattle of another commoner, becauſe the right of commonage of each commoner runs through the whole ſoil. *Style* 428. *Yelv.* 104. 2 *Lutw.* 1240. 4 *Bur.* 2426. 1 *Bl. Rep.* 673. *Wilſ.* 126.

But if a man has common for 10 beaſts, and he puts in more, the ſurpluſage, it is ſaid by ſome of the books, may be taken damage-feaſant. 2 *Lutw.* 1238. 1241. 9 *Co.* 11. 112. *Freem.* 273. Hall v. Haydinge. 4 *Bur.* 2426. 1 *Blu. Rep.* 6-3.

Though in others it is maintained that the remedy muſt be either by writ of admeaſurement, or by action on the caſe. *Freem.* 273. 4 *Bur.* 2431. *F. Nat. Br.* 125. And ſee 9 *Co.* 11. *Frem.* 273. *Wilſ.* 126. 4 *Term. Rep.* 7.

And ſo after admeaſurement may a commoner diſtrain the ſupernumerary cattle of a fellow commoner. 3 *Wilſ.* 287.

(*a*) In this caſe, however, two of the judges out of three doubted and thought a cuſtom ought to have been alledged to ſupport the diſtreſs. See 4 *Burr.* 2429.

In the caſe of an abſolutely ſtinted common, in point of number, one commoner may diſtrain the ſupernumerary cattle of another. 4 *Bur.* 2426. 1 *Blac. Rep.* 673. DISTURBANCE.

And ſo, if after pariſhioners have entered into an agreement not to uſe their right of common in the field for a certain time, and during that period the cattle of one come upon the land of the other, it may be diſtrained, for the agreement is an extinguiſhment of the common, *pro tempore*, and therefore the cattle are as it were the cattle of a ſtranger. Whiteman v. King. 1 *H. Blac. Rep.* 4.

If any commoner incloſes or builds on the common, the other commoners or either of them may have an action for damages. 1 *Roll. Ab.* 89. 398. 2 *Leon.* 201.

But where the turf is taken away, it is ſaid, the lord only as owner of the ſoil, can have the action, unleſs it be for entering with horſes, and to carry it away, and ſo impairing the common. *Ibid.*

No tenants of manors, farmers and occupiers of tenements of a manor, can take ſoil covered with graſs from a common, for the improvement of gardens, or for the making and repairing of banks, mounds and fences, of tenements belonging to the manor, not ſaying Agricultural improvement. Wilſon *v.* Willis, 3 *Smith's Rep.* 167.

A commoner may maintain an action on the caſe for an injury done to the common, by taking away from thence the manure which was dropped on it by the cattle; though his proportion of the damage be found only to the amount of *one farthing*. At leaſt, the ſmallneſs of the damage found is no ground for a nonſuit. Pindar *v.* Wadſworth. 2 *Eaſt's Rep.* 154.

If a commoner who has a freehold in the common be deprived of the enjoyment of his right whether by the lord or a ſtranger, he may have an aſſize; but if the commoner has but an eſtate for years, his remedy will be by action on the caſe; if, however, the injury be very ſmall no action will lie. 4 *Rep.* 37. 8. *ib.* 79. *Dyer* 360.

But the uſual remedies for ſurcharging the common are, either by diſtraining ſo many of the beaſts as are above the number allowed, or elſe by an action of treſpaſs; both which may be had by the lord: or laſtly, by a ſpecial action on the caſe for damages; in which any commoner may be plaintiff. But the ancient and moſt effectual method of proceeding is by writ of admeaſurement of paſture. This lies, either where a common Admeaſurement.

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appurtenant or in groſs is certain as to number, *(a)* or where a man has common appendant or appurtenant *(b)* to his land, the quantity of which common has never yet been aſcertained. In either of theſe caſes, as well the lord, as any of the commoners, is entitled to this writ of admeaſurement; which is one of thoſe writs, that are called *vicontiel*, being directed to the ſheriff, *(vice comiti)* and not to be returned to any ſuperior court, till finally executed by him. It recites a complaint, that the defendant hath ſurcharged, *ſuperoneravit*, the common: and therefore commands the ſheriff to admeaſure and apportion it; that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful ſhare. And upon this ſuit all the commoners ſhall be admeaſured, as well thoſe who have not as a thoſe who have, ſurcharged the common; as well the plaintiff, as the defendant. The execution of this writ muſt be by a jury of twelve men, who are upon their oaths to aſcertain, under the ſuperintendence of the ſheriff, what and how many cattle each commoner is entitled to feed. And the rule for this admeaſurement is generally underſtood to be, that the commoner ſhall not turn more cattle upon the common, than are ſufficient to manure and ſtock the land to which his right of common is annexed; or as our ancient law expreſſed it, ſuch cattle only as are *levant* and *couchant* upon his tenement: which being a thing uncertain before admeaſurement, has frequently, though erroneouſly occaſioned this unmeaſured right of common to be called a common without ſtint or *ſans nombre*; a thing which, though poſſible in law, does in fact very rarely exiſt. 3 *Blac. Com.* 237.

If, after the admeaſurement has thus aſcertained the right, the ſame defendant ſurcharges the common again, the plaintiff may have a writ of ſecond ſurcharge, *de ſecunda ſuperonèratione*, which is given by the ſtatute

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(a) But though it is laid down in one book that admeaſurement lies only where one has common appendant or appurtenant for a certain number, and does not lie againſt a commoner without number, *Fitz. N. B.* 125. *Sand.* 345. *Hard.* 116. *Blac. Rep.* 673. Yet the contrary is held in a ſubſequent caſe. *Ld. Raym.* 1187. 407. And See *Wilſon* 282.

(b) But *quære* of *appurtenant*. 2 *Inſt.* 86.

Weſtm. 2. 13 *Edw.* 1. *c.* 8. and thereby the ſheriff is directed to inquire by a jury, whether the defendant has in fact again ſurcharged the common contrary to the tenor of the laſt admeaſurement: and if he has, he ſhall then forfeit to the king the ſupernumerary cattle put in, and alſo ſhall pay damages to the plaintiff. This proceſs ſeems highly equitable: for the firſt offence is held to be committed through mere inadvertence; and therefore there are no damages or forfeiture on the firſt writ, which was only to aſcertain the right which was diſputed: but the ſecond offence is a wilful contempt and injuſtice; and therefore puniſhed very properly not only with damages, but alſo with forfeiture. And herein the right, being once ſettled, is never again diſputed; but only the fact is tried, whether there be any ſecond ſurcharge or no: which gives this neglected proceeding a great advantage over the modern method, by action on the caſe, wherein the *quantum* of common belonging to the defendant muſt be proved upon every freſh trial, for every repeated offence. 3 *Blac. Com.* 237. DISTURBANCE.

If the tenant ſurcharge, the lord ſhall not have this writ againſt the tenant, but he may diſtrain the ſurplusage damage-feaſant, See 1 *Danv.* 809. 1. and *N. Lutw.* 394. alſo if the lord ſurcharge the common, the tenant ſhall not have this writ againſt the lord, but he ſhall have aſſize of his common againſt his lord. What remedy if the lord ſurcharge, what if the tenant.

And in ſome caſes a commoner may have relief in equity againſt a ſurcharge of common. *Vern.* 308.

A commoner, from the intereſt he has in the common, may diſtrain damage-feaſant the cattle of a ſtranger ſtraying thereupon. 9 *Co.* 112. *b. Brid.* 10. *Roll. Ab.* 320. 405. *Yelv* 130. *Godb.* 185. *Jenk.* 144. *Wilſ.* 287. Remedy againſt ſtrangers.

But he cannot maintain an action for the treſpaſs unleſs laid, *per quod*, his common was impaired. *Keilw.* 47. Mary's caſe. 9. *Co.* 113. *Wells* v. Watling. 2 *Bla R ep.* 1233.

And in the caſe of diſtreſs he muſt alledge a particular damage in his avowry. Wotton v. Salter. 3 *Lev.* 104.

And ſee Gold v. Cother. 1 *Sid.* 136. D'Ayrolles v. Howard. 3 *Bur.* 1285. 2 *Mod.* 7. Atkinſon v. Treſdale. 3 *Wilſ* 278, (which caſe relates to the pleadings.) *Fit. N. B.* 126. 2 *Inſt.* 370.

Action on the caſe lies for ſtopping his way to the common. Formerly it was held, that if the defendant *ſtaliter* had ſtopt up the way, that an aſſize of nuiſance For ſtopping a way to the common.

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lies; but if it were ſtopt up in part, an action on the caſe: but it was reſolved, that for totally ſtopping up the way, an aſſize of nuiſance or action the caſe lies at the election of the party, be the ſtopping by the tenant of the freehold, or by a termor, or by an eſtranger. *Cro Eliz.* 845. Cantiel and Church, Style's *Rep.* 164. Ayre and Pinchcomb.

Aſſize, caſe of election.

Aſſize, or caſe at election, for a commoner in fee.

And ſo for ploughing up land, in which he has right of common; he may alſo have an action on the caſe, and therefore the difference in Robert Morris's caſe, 9 *Rep.* is over-ruled. 2 *Leon.* p. 184. Caſe 229. Levered and Townſend, Holland and Leveret cited in Morris's caſe.

One commoner alone may have an action on the caſe.

One commoner alone may have action on the caſe againſt a ſtranger, for depaſturing his common, for he may take them damage-feaſant, and that proves he has a wrong; and by the ſame reaſon if the beaſts are gone before his coming, he may have an action on the caſe; for otherwiſe one that has many beaſts may deſtroy all the common in a night, and ſhall not be puniſhed; and it is not like to a public nuiſance, which is puniſhable in a leet, but the other is private to the commoners, and one commoner may have this action, though every other commoner may have the ſame remedy. My Lord Hobart citing this caſe of Morris in Cowper and Andrews's caſe ſaith, if the lord of the ſoil plough it up, or make a water of it, every freeholder may have an aſſize, and every copyholder an action on the caſe. So is Whitland's caſe cited in Crogate and Morris's caſe. 2 *Brownl.* 149. 9 *Rep.* Robert Morris's caſe. 2 *Brownl.* 147. Crogate and Morris. *Hob.* 43.

Caſe per commoner, for eſtovers.

He that claims common of eſtovers, if the owner of the ſoil cut down all the trees firſt, the commoner cannot take them, but ſhall have his action on the caſe. See above tit. Eſtovers and remedy. *Yelv.* 187. Dowglas and Kendal's caſe.

3. *Who may join in one Claim for Common, or not.*

Inhabitants in a foreſt ought not to join in one claim. *Jones Rep.* 275, 286.

Tenants in ancient demeſne may join in claim for common.

Copyholders may join, who are tenants to one lord; and here the lord muſt preſcribe for him and his tenants.

are admitted; they may not claim the common that the others had, for it is extinct by alteration. *Quære.* 6. *Bulſt.* 19 in Grymes's caſe. SUSPENSION.

4. *Suſpenſion and Reviver of Commonage.*

If the commoner take a leaſe of any part of the land in which, &c. all the common is ſuſpended. As if a man hath common by preſcription, and takes a leaſe of the land for 20 years, whereby the common is ſuſpended; after the year ended he may claim the common generally by preſcription; for that the ſuſpenſion was but to the poſſeſſion, and not to the right, and the inheritance of the common did always remain: and when preſcription, or cuſtom doth make a title of inheritance, the party cannot alter, or wave the ſame in *pais*. 1 *Inſt.* 114, *b.* *Co.* 9 *Rep.* 135.

By leaſe of any part of the land in which all the common is ſuſpended.

When preſcription doth make a title of inheritance, the party cannot wave the ſame in pais.

If a commoner incloſe part of the waſte, out of which the common is iſſuing, this ſuſpends the common. 1 *Roll. Abr.* 938. Bradſhaw's caſe.

Suſpended by incloſure.

A common is appurtenant to copyhold land which eſcheats, and the lord grants all the lands with ſuch, or all the commons, &c. the common is revived. 2 *And.* 169.

Revivor.

N. B. is ſeiſed of lands in fee. *G. F.* is ſeiſed of an houſe and two acres of land, and had common in the ſaid lands of *N. B.* afterwards *G. F.* enfeoffs *N. B.* of the ſaid tenement and two acres of land; and the ſaid *N. B.* demiſeth to *J.* the ſaid tenement and two acres of land, and all commons appertaining, or uſed, or occupied therewith, &c. this common is extinct and not revived. But it may amount to a good grant of common for the time. *Cro. El.* 570. Bradſhaw's caſe.

Extinct and not revived by words *cum pertinentiis*, or commons appertaining.

CHAP. VIII.

OF GRANT OF COMMON.

1. *What Common is grantable over, and what not.*
2. *By what Words Common ſhall paſs, whether Ancient Common, or Common* de novo. *And where common ſhall paſs by Grant of the Manor, or Lands.*
3. *The Expoſition and Extent of a Grant of Common.*
4. *Where Common will paſs without Deed. And where a Grant of Common ſhall be good by relation to a precident Bargain.*

1. *What Common is grantable over, or not; or may be ſevered from the Manor.*

Common without number.

A COMMON without number in fee, is grantable to another; for the word heirs implies aſſignees. But by Rolle, common without number may not be granted over, for it is a common in groſs. 21 *Ed.* 4. 84. 2 *Roll. Rep.* 73.

Eſtovers uncertain.

But common for life, or years, without number, is not grantable, for this may be a prejudice to the tenant of the land. 8 *Ed.* 4. 17.

Eſtovers uncertain, viz. So much as I ſhall uſe in my chimney, are not grantable over. 22 *Ed.* 4. 6.

A commoner may not grant over his common, except he grant over his tenement; for they may not be ſevered. And ſo is Nevil's caſe in the Commentaries: for the preſcription is annexed to the land, and in caſe of eſtovers to the houſe. *Winch.* p. 45.

Where common appurtenant may be granted over, and where not.

A man preſcribes to have common appurtenant to the manor of *B.* for all his beaſts *levant* and *couchant* upon it, he grants this common to *A. Per Cur.* he cannot grant it over, for he hath it *quaſi ſub modo*, (viz. for the beaſts *levant*, &c.) but common appurtenant for beaſts certain may be granted over. So Spooner and Day's caſe: *A.* preſcribes for a fold-courſe, viz. common of paſture for any number of beaſts not exceeding 300, in a field appurtenant to a manor; he may grant over this fold-courſe to another, and ſo make it a common in groſs, becauſe

Where tenants in common ſhall join in action for a *tort*, to the common, or not. See above, p. 75, 76. DISTURBANCE.

The huſband brought an action on the caſe without his wife, for diſturbance of the common which he claimed in the right of his wife. *Vide* 2 *Bulſt.* 14. Baker's caſe. Baron and feme.

Tenant at will may have an action on the caſe, for the deſtruction of his common of paſture, with conies of the defendant, and building an houſe on the common. *Sir Thomas Jones's Rep.* 5. Timberly v. Grubham and How. Tenant at will.

If two joint owners of a ſum of money are robbed of a ſum of money on the highway, they may join in one action againſt the hundred. *Dyer* 370. 2 *Leon* 12. Joint tenants, &c.

If the ſeveral cattle of *A.* and *B.* are diſtrained, and *C.* in conſideration of 10l. paid him by *A.* and *B.* promiſes them to procure the cattle to be re-delivered to them; if they are not re-delivered, one joint action lies. For it is ſaid the conſideration is entire and cannot be divided. *Style*, 156, 157, 203. *Vide* 1 *Roll. Abr.* 31 Z. 9. Joint action.

A. holds lands of ſeveral lords by heriot-cuſtom, and to defraud them of their heriots, makes a fraudulent gift of all his beaſts, heriotable; it is ſaid all the lords may join in an action for this *tort* upon 13 *Eliz.* *Dyer* 341. *ſed quære.* Heriots.

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CHAP. X.

The mode of proceeding in obtaining Acts of Parliament for incloſing Common and other Waſte Lands.

THE firſt ſtep to be taken for procuring an incloſure act, is the preſenting a petition for that purpoſe to the *houſe of commons*.

Notice of Petition.

But before ſuch petition is preſented, a printed or written notice of the intended application muſt be affixed on the church door of the pariſh or pariſhes in which the commons, &c. lie, for *three* Sundays, in the months of *Auguſt* and *September*, or either of them, immediately preceding the ſeſſion of parliament in which ſuch petition is to be preſented (*a*). *Order H. Com.* 1774.

The form of this notice may be as follows:

Form of ſuch Notice.

Auguſt 8, 1800.

"Notice is hereby given to the proprietors of lands and eſtates in the pariſh of Banes, in the county of Glouceſter, and to all other perſons whom it may concern, that at the next ſeſſion of parliament a petition will be preſented to the Honourable Houſe of Commons for leave to bring in a bill in order to obtain an act of parliament for dividing, allotting, and incloſing the commonable lands and waſte grounds in the pariſh of Banes aforeſaid."

As the perſon affixing the notices on the church door will be called upon at the committee on the bill to prove it, he ſhould take a copy thereof, and make a memorandum of the time he affixed it.

Or, he ſhould make an affidavit before two magiſtrates, that he ſaw the notice, annexed to the affidavit, upon ſuch church doors, for three Sundays. *Ell. Pract. Rem.* 64. (Edit. 1802).

It has been ordered by the houſe, that every petition ſhall truly ſtate the caſe; and the ſuggeſtions and rea-

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(*a*) *N. B.* It will not be neceſſary to affix upon the church door a freſh notice every Sunday, unleſs the firſt be torn or obliterated.

Note alſo, that if the notices have not been affixed preciſely agreeably to the order of the houſe, it muſt be ſpecially reported, upon which the houſe will ſometimes diſpenſe with the informality.

tions of such petition; and that the same shall be signed by the parties who are suitors for the bill.

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The form of this petition may be thus:

Form of petition for leave to bring in the bill.

"To the Honourable the Commons of Great Britain in Parliament assembled.

The humble petition of the several persons whose names are hereunto subscribed on behalf of themselves and other owners of estates in the parish of Banes, in the County of Gloucester;

SHEWETH,

That there are within the said parish of Banes several commonable lands, and waste grounds, containing in the whole, by estimation, 8,000 acres or thereabouts.

That if the said commonable lands and waste grounds were divided and alloted unto and amongst the several persons interested therein, according to their several and respective rights and interests, and such allotments inclosed, they would be rendered of much greater value, and might be much improved.

Your petitioners therefore humbly pray, that leave may be given to bring in a bill for dividing, allotting, and inclosing the said lands and grounds, in such manner and under such regulations and restrictions as to this Honourable House shall seem meet.

And your petitioners shall ever pray, &c."

This petition should be writen fair in words at full length, on unstamped paper or parchment, and it is necessary that the signatures of two or three of the principal proprietors of the parish should be procured to it, though it will be better to obtain the signatures of as many proprietors as can be had, in order to prevent their being afterwards seduced or influenced to oppose the bill:—these signatures are not required to be proved.

The petition is to be presented by a member of the house, and it is usual to compliment one of the members for the county or place within which the parish is situated, with the care of the bill through the house. Upon the petition being presented, if leave be given to bring in the bill, it may be brought in and read a first time the same day, (it should therefore be prepared and printed

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ready); or it may be brought in afterwards, at any time in the course of the session.

The order of leave to bring in the bill may be obtained the following day from the office.

In all bills for inclosing lands or commons, the names of the commissioners proposed to be appointed, and the compensations intended for the lord of the manor, and the owners of tithes, in lieu of their respective rights, *where such bargains or agreements have been made for such compensations*, shall be inserted in the copy of the bill presented to the house, and in all copies of such bills sent to any of the persons interested in the said commons, for their consent. *Order H. Com.* 1774. Confirmed by an order of June 30th, 1801.

Framing the Bill.

And in all bills for inclosures there shall be inserted a clause, compelling the commissioners to account for all monies by them laid out, and assessed on the parties concerned in the said inclosures. *Ibid.*

And also provision shall be made for fencing out all the public carriage roads on each side, from the lands adjoining; and for preventing any gate from being erected across any of the said roads; or trees being planted on either side of the said public roads nearer to each other than within the distance of fifty yards. *Ibid.* 14 *March*, 1781.

And it has also been ordered by the lords, that in any inclosure bill, whenever any sum of money is to be paid in the gross for any hereditaments to be bought or exchanged by such bill, and is to be laid out in the purchase of other hereditaments to be settled to the same uses, provision shall be made in the said bill that such sum of money, not being less than 100*l.* shall be paid into the Bank of England in the name of the Accountant General of the Court of Chancery, to be placed to his account there, *ex parte* the commissioners or public trustees in each particular bill appointed, pursuant to 12 Geo. 1. c. 3. and 12 Geo. 2. c. 24. See *Order H. Com.* 3 *Jan.* 1799.

It has further been ordered that, in all bills of inclosure, a clause be inserted, compelling the commissioners to keep at the office of their clerk, a book of accounts, open at all reasonable times during the progress of the inclosure, and till the accounts are finally settled, for the inspection of any of the proprietors; which book shall contain an entry of the particulars of all sums of money raised or expended by virtue of any powers granted by

the act, under a penalty on such commissioners or their clerk, for neglecting or refusing the same: And also a clause, providing that all monies to be raised under and by virtue of the powers contained in such act, shall, as often as the same shall amount to the sum of 50l. be paid into the hands of some banker, or of such other person or persons as shall be approved by a majority, in value, of such proprietors who shall be present at the first meeting of the said commissioners; and in the notice of which meeting shall be expressed the intention of then appointing such banker, or such other person or persons: And that no monies be issued out of the hands of such banker or person or other persons, without an order of the commissioners, specifying the person to whom the same are payable, and the service for which the same are due; and that the balance, if any, upon the final settlement of accounts, shall be immediately paid to the land-owners, in proportion to the sums respectively paid by them: And also a clause, providing that the award shall be read and executed by the commissioners, in the presence of the proprietors who may attend at a special general meeting called for that purpose, of which ten days notice at least shall be given in some newspaper to be named, circulating within the county; which execution of such award shall be proclaimed the next Sunday in the parish church, from the time of which proclamation only, and not before, such award shall be considered as complete. *Order H. Com.* 3d March, 1800.

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The House of Lords have likewise ordered that, in any inclosure-bill, whenever any sum of money is, under the provisions of such act, to be paid for the purchase or exchange of any lands, tenements, or hereditaments, or which sum of money ought to be laid out in the purchase of other lands, tenements, or hereditaments, to be settled to the same uses, provision shall be made in the said bill, that such sum of money, not being less than the sum of 200l. be paid into the Bank of England, in the name and with the privity of the Accountant-General of the court of Chancery, to be placed to his account, *ex parte* the commissioners under such particular bill, or under such other title as by the said bill shall be directed, pursuant to the method prescribed by the act of the 12th year of King GEORGE the First,

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c. 32, and the general orders of the ſaid court, and without fee or reward; and ſhall, when ſo paid in, there remain until the ſame ſhall, by order of the ſaid court, upon a petition to be preferred to the ſaid court, in a ſummary way be applied either in the purchaſe of land-tax, or towards the diſcharge of any debts or incumbrances affecting the ſaid lands, tenements, and hereditaments ſo purchaſed or exchanged; or until the ſame ſhall, upon the like application, be laid out in a ſummary way, by order of the ſaid court, in the purchaſe of other lands, tenements, or hereditaments, to be ſettled to the like uſes: And in the mean time, and until ſuch order can be made, ſuch money may, by order of the ſaid court, be laid out in ſome of the public funds, or in government or real ſecurities; and the dividends or intereſt ariſing therefrom, ſhall, by order of the ſaid court, be paid to ſuch perſon or perſons as would for the time being be entitled to the rents and profits of ſuch lands, tenements, and hereditaments ſo to be purchaſed, conveyed, and ſettled; And in caſe ſuch ſum of money ſhall be leſs than the ſum of 200l. and ſhall exceed the ſum of 20l. then and in ſuch caſe, ſuch ſum of money ſhall, with the approbation of the commiſſioners acting under ſuch act, or any three or more of them, be paid into the Bank of England, and applied by order of the court of Chancery in manner herein before directed; or may, without any order of the court of Chancery, be paid into the hands of two truſtees to be nominated by the perſon or perſons who for the time being would be entitled to the rents and profits of the lands, tenements, and hereditaments ſo to be purchaſed and ſettled, ſuch nomination to be approved of by three or more of the ſaid commiſſioners, and ſuch nomination and approbation to be in writing under the hands of the perſons ſo nominating and approving; And the money ſo paid to ſuch truſtees ſhall by them be applied in like manner as is before directed with reſpect to the money ſo to be paid into the Bank in the name of the Accountant-General of the court of Chancery, but without any order of the ſaid court touching the application thereof; And in caſe ſuch ſum of money ſhall not exceed 20l. then the ſame ſhall be paid to the perſon or perſons who for the time being would be entitled to the rents and profits of the lands, tenements, and hereditaments ſo to be purchaſed and con-

veyed, for his, her, or their own uſe and benefit. And if any commiſſioner in an incloſure or drainage bill, ſhall find any difficulty in obtaining a purchaſe in land, which may be equal in value to ſuch ſum of money not exceeding 200l. as by the ſaid ſtanding order is directed to be paid into the Bank to await a future purchaſe, or which purchaſe may be diſadvantageous in other reſpects, ſuch commiſſioners ſhall be at liberty to apply ſuch ſum of money towards the expences of ſuch act, ſo far as the proportion of the party entitled to ſuch ſum ſhall amount to; and if there ſhall be any ſurplus of ſuch 200l. they may apply ſuch ſurplus, after ſuch application, in diminution of the ſum allowed to be charged upon the eſtate for the purpoſe of incloſure or drainage." *Ord. H. L.* 7th May, 1800. PROCEDURE FOR INCLOSURE ACTS.

By an order of the Houſe of Commons, June 24th, 1801 (which, with its ſubſequent reſolutions, is by an order of July 2d, 1801, made a ſtanding order) it is reſolved:

1ſt, "That in all future bills for incloſing lands or commons, a clauſe be inſerted providing what ſum of money, in the whole, ſhall be paid to each commiſſioner to be appointed by ſuch bill, in full ſatisfaction of his expence and trouble in the execution of the truſts and powers thereby given; or that in default of ſuch proviſion being made, a clauſe be inſerted, providing that the account of ſuch commiſſioner, containing a true ſtatement of all ſums received and expended, or due for their own trouble or expences, ſhall at leaſt once in every year, from the date of the paſſing of ſuch act till ſuch accounts ſhall be finally allowed, together with the vouchers relating to the ſame, be examined by ſome perſon or perſons in ſuch bill to be named, and the balance by him or them ſtated in the book of accounts already required to be kept in the office of the clerk of ſuch commiſſioner; and that no charge or item in ſuch accounts ſhall be binding or valid, unleſs the ſame ſhall be ſo duly allowed.

2d. "That in all ſuch bills, proviſion be made, that no witneſs ſummoned to attend ſuch commiſſioner ſhall be obliged to travel above eight miles from the boundary of the pariſh, manor, or diſtrict, thereby intended to be incloſed.

3d. "That in all ſuch bills, proviſion be made for empowering and requiring the commiſſioners therein

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named, to appoint a ſurveyor, with or without a ſalary, for the firſt forming and completing ſuch parts of the public carriage-roads directed to be ſet out and appointed by ſuch bill, as ſhall be newly made, and for putting into complete repair ſuch part of the ſame as ſhall have been previouſly made, and for defraying the expence of ſuch ſalary, and of forming, completing, and repairing ſuch roads reſpectively, over and above a proportion of the ſtatute-duty on the roads to be ſo repaired, either by ſale of a ſufficient portion of the ſaid lands, or by a rate to be ſettled and apportioned by ſuch commiſſioners upon the owners and proprietors of the ſame: And in caſe of ſale of ſuch lands for the payment of the produce thereof, before the execution of the award to ſuch ſurveyor or ſurveyors, to be accounted for as hereinafter-directed, and for making a conditional rate upon ſuch owners and proprietors, in caſe the produce of ſuch ſale ſhould prove inſufficient for the purpoſes aforeſaid, and for ſubjecting ſuch ſurveyor and his accounts to the juriſdiction and controul of the juſtices of the peace in all reſpects whatever, and with the ſame powers of levying ſuch rate as may by ſuch juſtices be thought neceſſary, according to the proportions previouſly aſcertained by ſuch commiſſioner or commiſſioners, in like manner as if he or they had been appointed by virtue of the general highway act paſſed in the thirteenth year of his preſent Majeſty, and for the repayment of any ſurplus that may remain in his hands after ſuch roads ſhall be completely formed and repaired, to ſuch perſons as ſhall have been made liable to contribute thereto, according to the proportions abovementioned; and for preventing any charge or burthen being laid on the inhabitants at large, except ſuch proportion of ſuch ſtatute-duty as aforeſaid, until the ſame ſhall by ſuch juſtices, in their ſpecial ſeſſions, be ſo ordered or directed: And for enforcing by certain penalties on ſuch ſurveyor, to be ſpecified in ſuch bill, the completing and repairing ſuch roads within two years after the ſaid award, unleſs ſuch juſtices ſhall, on ſufficient cauſe being alledged, and proved to their ſatisfaction, grant a further time, not exceeding one year.

4th, "That in all ſuch bills, whenever any money is, under the proviſions of ſuch bill, to be paid for the purchaſe or exchange of any lands, tenements, or hereditaments, or of any timber or wood growing thereon,

and which money ought to be laid out in the purchaſe of other lands, &c. to be ſettled to the ſame uſes, proviſion ſhall be made for empowering the commiſſioners therein named, out of ſuch ſum to defray ſuch proportion of the expence of paſſing ſuch act, and carrying the ſame into execution, as ſhall, if any, be charged upon any of the lands, &c. of the perſon or perſons, body politic or corporate, truſtees or feoffees, in poſſeſſion of the lands, &c. ſo ſold or exchanged, or on which ſuch timber or wood actually grew; and alſo the expence of any permanent improvement, ſuch as building, ſub-dividing, draining, or planting, and the like, which ſhall in the judgment of ſuch commiſſioners be proper to be made, and ſhall be made under their direction, upon any lands to be by virtue of ſuch bill allotted to ſuch perſon or perſons reſpectively: And that the ſurplus thereof, not being leſs than the ſum of 200l. be paid into the Bank of England, in the name and with the privity of the Accountant-General of the court of Chancery, to be placed to his account, *ex parte* the commiſſioner, or commiſſioners under ſuch particular bill, or under ſuch other title as by the ſaid bill ſhall be directed, purſuant to the method preſcribed by the 12 Geo. 1. c. 32. and the general orders of the ſaid court, and without fee or reward; and ſhall, when ſo paid in, there remain until the ſame ſhall, by order of the court, upon a petition to be preferred to the ſaid court, in a ſummary way, be applied either in the purchaſe of land-tax, or towards the diſcharge of any debts or incumbrances affecting the ſaid lands, &c. ſo purchaſed or exchanged, or until the ſame ſhall upon the like application be laid out in a ſummary way, after allowing for the expences neceſſarily attending ſuch purchaſe by order of the court, in the purchaſe of other lands, to be ſettled to the like uſes: And in the mean time, and until ſuch money may, by order of the court, be laid out in ſome of the public funds, or in government or real ſecurities, and the dividends or intereſt ariſing therefrom ſhall by order of the court be paid to ſuch perſons as would for the time being be entitled to the rents and profits of ſuch lands, &c. ſo to be purchaſed, conveyed, and ſettled: And in caſe ſuch money ſhall be leſs than 200l. and more than 20l. then it ſhall, with the approbation of ſuch commiſſioners, be paid into the Bank of England, and applied by or-

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der of the court of Chancery, in manner herein before directed, or may without any order of the court of Chancery, be paid into the hands of two truſtees to be nominated by the perſons who for the time being would be entitled to the rents and profits of ſuch lands, &c. ſuch nomination to be approved of by ſuch commiſſioners, and ſuch nomination and approbation to be in writing under the hands of the perſon ſo nominating and approving; and the money paid to ſuch truſtees, ſhall by them be applied in like manner as is before directed with reſpect to the money ſo to be paid into the Bank, in the name of the Accountant-General of the court of Chancery, but without any order of the ſaid court touching the application thereof: And in caſe ſuch ſum ſhall not exceed 20l. then the ſame ſhall be paid to the perſons, who for the time being would be entitled to the rents and profits of the lands, &c. ſo to be purchaſed and conveyed, for their own uſe and benefit.

5th, "That no intereſted perſon ſhall be named a commiſſioner, ſurveyor, or valuer, in the incloſure to be made by virtue of ſuch bill, or the agent ordinarily intruſted with the care, ſuperintendance, or management of the eſtate of any perſon ſo intereſted.

6th, "That in all ſuch bills a clauſe be inſerted, requiring the commiſſioners to ſet out the public carriage-roads in ſuch directions as ſhall appear moſt commodious for the public, and to aſcertain the ſame by marks and bounds, and to prepare a map, in which ſuch intended roads ſhall be accurately laid down and deſcribed, ſuch map, ſigned by the commiſſioner, if only one, or the major part of the ſaid commiſſioners, to be depoſited with their clerk; and as ſoon as may be after ſuch carriage-roads ſhall have been ſo ſet out, and ſuch map ſo depoſited, to give notice in ſome newſpaper, circulating within that part of the county where ſuch intended incloſure ſhall lie, which notice ſhall alſo be affixed upon the church-door of the pariſh, of having ſet out ſuch roads, and depoſited ſuch map, and alſo of the general lines of ſuch intended carriage-roads, and to appoint in the ſame notice a meeting to be held by the ſaid commiſſioners, at ſome place in or near to the pariſh or townſhip within which the incloſure is to be made, and not ſooner than three weeks from the date of ſuch notice; at which meeting any perſon who may be injured or aggrieved by the ſetting out of ſuch roads, may

attend; and if any perſon ſhall object to the ſetting out of the ſame, then the commiſſioners, together with any juſtice acting for the diviſion in which ſuch incloſure ſhall be made, and not being intereſted in the ſame, who may attend ſuch meeting, ſhall hear and determine ſuch objection, and the objections of any other ſuch perſon, to any propoſed alteration, and ſhall, according to their judgment upon the whole, direct how ſuch carriage-roads ſhall be ſet out, and either confirm the ſaid map, by re-ſigning the ſame, or make ſuch alterations therein as the caſe may require: And in caſe ſuch commiſſioners ſhall by ſuch bill be empowered to ſtop up any old or accuſtomed road paſſing through any part of the old enclоſures in ſuch pariſh, townſhip or place, the ſame ſhall in no caſe be done without the concurrence and order of two juſtices of the peace acting in and for ſuch diviſion, and not intereſted in the repair of ſuch roads, and be ſubject to an appeal to the quarter-ſeſſions, in like manner as if the ſame was originally ordered by ſuch juſtices.

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7th, "That bills for the purpoſe of incloſing ſmall tracts of land, not exceeding three hundred acres, and effecting the ſame by clauſes uſual in ſuch bills, ſhall be conſidered, as to the payment of fees, only as ſingle bills; and that thoſe for the incloſure of ſmall tracts of land to be effected as above, not exceeding one hundred acres, ſhall be ſubject only to the payment of half the bill fees due on a ſingle bill; the admeaſurement in both caſes to be proved according to ſuch form as may be preſcribed by any act paſſed in this ſeſſion of parliament."

But by an order of June 30th, 1801, the order of March 14th, 1781 (p. 84 *ante*), as well as that of March 3d 1801, together with the ſecond, third, fourth, and ſixth of the reſolutions of June 24th, 1801, ſhould be limited in their conſtruction, ſo as only to prevent any ſuch bill from containing clauſes contrary to any ſuch reſolutions reſpectively.

After the bill is prepared, a meeting ſhould be had of the proprietors to ſettle it; and when it is finally ſettled, a fair copy on brief paper muſt be made, to be preſented to the houſe, room being left on the firſt ſheet for the title of the bill to be ſettled, and filled up on the third reading; to this copy there need be no marginal notes,

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nor ſhould there be any interlineations; and roomy blanks muſt be left for dates, ſums, &c.—Indorſe the title of the bill on the back.

Another copy of the bill muſt be made for the printer with the like blanks, and with the addition of the title of the bill and marginal notes; and a further copy (unleſs the bill has been previouſly printed) may be made for the purpoſe of taking the conſent of the proprietors upon it.

First reading of the bill.

By orders of Nov. 1705. and Dec. 1706, all private bills brought into the Houſe of Commons, are to be printed before the firſt reading. And by a prior order of the houſe, no private bill ſhall be read till printed copies be delivered to the members. It will ſave time, therefore, to have the bill printed before it is preſented.

The bill being printed, twelve copies ſhould be left with the door-keeper of the houſe, and when the houſe copy is prepared, a breviat, or ſhort extract thereof, ſhould be made for the ſpeaker of the houſe in the following manner:

Breviat of bill.

"Bill ſtates, that it would be advantageous to the ſeveral proprietors of the commonable lands, &c. of the pariſh of Banes com. Glouceſter, that the ſame ſhould be divided and incloſed.

"The bill therefore enacts that, &c.

"And there are clauſes in the bill for appointing commiſſioners—filling up vacancies," &c. &c. *(agreeably to the actual contents.)*

Tie up together the order of leave, two printed copies of the bill, and the houſe copy—and leave them with the door-keeper of the houſe, and he will lay them on the bar in the houſe, from whence the member will take the bill and preſent it; he will then move to read it a firſt time, which is ordered of courſe; and the bill remains with the clerk of the houſe until it is ordered to be committed.

As the introduction of the bill may be oppoſed at the outſet, ſo may the bill itſelf at any of the readings; and if the oppoſition ſucceed, the bill muſt be dropped for that ſeſſion (*a*), as it muſt alſo if oppoſed with ſucceſs in any of the ſubſequent ſtages.

(*a*) Unleſs the bill be ſo materially altered as that it cannot any longer be conſidered as the ſame bill in

When therefore any oppoſition is expected, in order to defeat that oppoſition, procure the attendance of as many members as you can, in every ſtage of the bill. PROCEDURE FOR INCLOSURE ACTS.

But though it may be oppoſed, at pleaſure, by any *member* of the houſe, yet no *private* perſon can be heard againſt the bill until a petition for that purpoſe has been preſented to the houſe.

This petition may be thus framed:

Form of petition to be heard againſt an incloſure bill.

"To the Honourable Commons of Great Britain in Parliament aſſembled.

The petition of the Right Hon. Henry Earl of Pembroke;

SHEWETH,

That your petitioner is informed that a bill is depending in this Honourable Houſe for dividing, alloting, and incloſing the commonable lands, and waſte grounds, in the pariſh of Banes, in the county of Glouceſter:

That your petitioner begs leave to ſtate to this Honourable Houſe, that if the ſaid bill ſhould paſs into a law in its preſent form, the rights and intereſts of your petitioner will be very materially injured.

Your petitioner therefore prays, that he may be heard by his counſel or agents againſt ſuch parts of the ſaid bill as affect his rights and intereſt, and that he may have ſuch relief in the premiſes as to this Honourable Houſe ſhall ſeem meet.

Pembroke."

Second reading.

By an order of the houſe, 1699, the ſecond reading cannot be ſooner than the fifth day from the firſt, as there muſt be three excluſive days between the ſeveral readings, when a member muſt be requeſted to move it. On the ſecond reading (if there be no oppoſition) it will be *committed* for that day ſe'nnight. As ſoon as the bill is committed, it will be proper to obtain from the clerk who is to attend the committee a copy of the members who are to compoſe the committee, and then to apply to ſome of the members named therein to attend the committee. And *note*, that if the ſitting of the committee

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which caſe it may, though rejected, be introduced again in the ſame ſeſſion.

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ſhould be fixed for a time which will be inconvenient for the parties to attend, you may, by leave of the committee, have it deferred to any time afterwards in the ſeſſion, giving reaſonable notice to the parties who oppoſe the bill. *Ell. Prac. Rem.* 43, 44.

On the ſecond reading of the bill it is that the fees payable upon bills become due: and the officers of the houſe have a right to withhold a bill from being read a ſecond time, until the fees are either paid, or ſome perſon is anſwerable for them.

Conſent of proprietors.

It will now be neceſſary (unleſs it has been previouſly done) to tender a written or printed copy of the bill to every proprietor for his conſent (which is beſt manifeſted by his ſignature) to the bill (*a*). And *note*, that the perſons applying for this conſent muſt be ſuch as are able to give evidence on oath in the Houſe of Lords of every perſon's anſwer on the application; they muſt not therefore be perſons intereſted. The conſents of the proprietors *may* be taken on different bills; but it is the beſt and leaſt expenſive way to take them all upon the *ſame* bill if it can be done.

N. B. The conſent of *four-fifths* of the proprietors, in number and value, is expected by parliament; though there is no *fixed rule* in this reſpect. Every perſon, however, who has property, muſt be accounted for, either as aſſenting, diſſenting, neuter, or not to be found. *Ell. Prac. Rem.* 85, 86.

And at the end of every bill upon which any conſent is taken, it will be proper that the conſenting parties ſhould ſign ſomething to this effect:

We (or I) do conſent to this bill paſſing into a law, ſubject to ſuch alterations as the legiſlature may judge proper.

If any of the proprietors are abroad, it will be neceſſary to prepare a ſpecial power of attorney to ſome perſon to ſign the bill for them; and an affidavit of the due execution muſt be ſworn to by one of the ſubſcribing witneſſes.

(*a*) By one of the ſtanding orders of the houſe, perſonal attendance before the committee is required, for the purpoſe of aſſenting to any private bill: but this, in the caſe of inclоſure bills, is always diſpenſed with.

But a power of attorney for any perſon to ſign the bill for a proprietor *reſident* in *England* will not be admitted. In caſes, however, where ſome of the ſmall proprietors reſide at a great diſtance from London, and a perſonal application would be attended with conſiderable expence; in order to ſave ſuch expence, if he be acquainted with a member of parliament, who knows his hand-writing, he may ſign a print of the bill, and ſend it to that member; and, if ſuch member attends the committee with the print, and identifies the ſignature to it, ſuch ſignature will be deemed ſufficient, *Ell. Prac. Rem.* 86. 87.

By an order of 30th June, 1801 (which has by the enactment of the 41 Geo. 3. c. 109. become a ſtanding order) all perſons intereſted in an incloſure bill may ſignify their conſent to the ſame by an affidavit, taken according to the form preſcribed by the 41 Geo. 3. c. 109. unleſs the contrary be ordered by the committee to whom the petition or bill for ſuch incloſure ſhall be referred. And ſuch committee may admit proof of the notices required by the ſtanding orders of the Houſe of Commons, and of the allegations contained in the preamble of the incloſure bill by affidavit taken in like manner.

Committee on the bill.

If any alterations are deſired to be made in the bill, they may be propoſed in the committee (*a*); and to that end a written paper of the propoſed amendments, with references to the pages and lines of the houſe bill (*b*) where they are to be inſerted, ſhould be prepared.

At this committee the fixing up of the notices on the church door, the allegations of the preamble of the bill, the ſignatures to the conſent bill, and a ſtatement of the quantity and value of each perſon's property concerned in the incloſure, are to be proved, though not upon oath. On the day therefore fixed for the committee to proceed upon the buſineſs, the neceſſary witneſſes, and other proofs for theſe purpoſes, muſt attend and be produced.

(*a*) To compoſe the committee there ſhould regularly be eight; though where there is no oppoſition to the bill this rule is not ſtrictly attended to. *Ell. Prac. Rem.* 49, 50.

(*b*) This will be found with the clerk of the committee.

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And it will be proper that the clerk of the committee ſhould be informed of the day when the buſineſs is to be entered upon, that he may have the bill ready. The committee being met, a printed bill (with the blanks filled up as they are intended to ſtand, and the alterations inſerted, if any are intended to be made) is to be delivered to each member. When the firſt thing to be done will be to prove the notices being affixed on the church door by the perſon who affixed it, and who ſhould therefore attend with a copy of ſuch notice. The ſtatement of property mentioned above muſt then be proved, which may be done by any old proprietor in the pariſh. Laſtly, proof muſt be made of the ſignatures to the conſent bill, and the anſwer of every proprietor who has ſigned the bill. The whole bill being then regularly read through, clauſe by clauſe, any additional clauſes or other alterations which are propoſed to be made, are to be read by the clerk, and moved by the member to be made a part of the bill. This being done, the chairman quits the chair, and the committee is at an end (*a*). The conſent bill, ſtate of property, and a printed bill, with the amendments made in red ink, or a written paper of amendments, with references to the folios and lines of the houſe bill are to be left with the committee clerk, to enable him to make out the report, &c. and he will fix a day to examine the amended clauſes and report. But if no alterations are to be made in the bill, and there is no oppoſition to it, the committee clerk will, if requeſted, prepare the report againſt the time the committee meet, upon the conſent bill and ſtate of property being left with him for that purpoſe; and the bill may then be reported the ſame day on which you go into the committee (*b*).

If any material alterations are intended to be made in the bill after it has paſſed the committee, the bill ſhould

(*a*) If there is not time to go through with the bill the firſt day, the committee may be adjourned without any ſpecial order of the houſe for the purpoſe. *Ell. Prac. Rem.* 47.

(*b*) But in this caſe you ſhould go down to the clerk to examine the report with him before the committee meet.

be reported, and then it may be re-committed and the alterations made. *Prac. Rem.* 51. PROCEDURE FOR INCLOSURE ACTS.

The report being prepared and finished, the chairman of the committee should be requested to come down to the house to report the bill, and if it be inconvenient to him to attend, he will depute some other member to report it for him. Report.

These papers should be tied up in the following order:—1. The additional clause and paper of amendments place in the inside of the house bill.—2. Petitions against the bill, (if any) upon the house bill.—3. Report, upon the petitions, (if no petitions next the house bill).—4. A printed copy of the bill, with the amendments made in it, and the blanks filled up, upon the report.—And 5. Upon the printed bill there should be placed a slip of paper, with the name of the member who is to make the report.

But *note*, that this printed bill is for the member, and not a part of the papers belonging to the report.

If upon the report no amendments or alterations are made which may render it necessary that the bill should be re-committed, it is ordered to be ingrossed.

After the member has got the report, &c. he will (when he has reported it) bring to you, in the lobby, the house bill, with the alterations and additional clauses, (if any); this is to be taken to the ingrossing clerk's office to be ingrossed (*a*). Ingrossment.

When the ingrossment is completed, it must be carefully examined, first by the house bill, and then by a printed bill. This may be done by the solicitor and his clerk, or one of the committee clerks, who being more used to it may examine with greater correctness; and this is very material, for if the ingrossment is not verbatim

(*a*) Bills are ingrossed in the order in which they stand, but if an extra fee be paid the clerks for expedition, they will have it ingrossed (unless it be very long) by the next day. Indeed, if no alterations are expected to be made on the report, a printed bill may be examined with the house bill, and the ingrossment begun upon before the bill is reported, by which means the ingrossment may be laid on the table, and the bill read a third time the day after it is reported.

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like the houſe bill, with the amendments, the lords will ſend back the bill to be altered, which will occaſion great delay.

The ingroſſment being examined, the ingroſſing clerk will lay it, together with the breviat, on the table in the houſe of commons.

Third reading of the bill.

The ingroſſment being laid on the table, a member muſt be requeſted to move that the bill be read a third time. Amendments are ſometimes even then made to it; in which caſe it muſt be done on the motion of a member; and if a new clauſe be added, it is done by tacking a ſeparate piece of parchment on the ingroſſment, which is called a rider. The title to the bill is then ſettled, and filled up. After this, one of the members of the houſe is directed to carry it to the lords and deſire their concurrence; and he attended by ſeven others (*a*), carries it to the bar of the Houſe of Lords, and there delivers it to their ſpeaker, who comes down from his woolſack to receive it. *Blac. Com.* 180.

If the bill is not carried up to the lords the ſame day, the ingroſſment will be found in the ingroſſing clerk's office. From whence it ſhould be carried (with the breviat) to the door-keeper of the Houſe of Lords, to be taken care of till a ſufficient number of members can be procured to carry it into the houſe. If the member who had the care of the bill in the Houſe of Commons cannot attend, any other member may be got to carry it up, but for this purpoſe there ſhould regularly be a ſpecial order: this however is now uſually diſpenſed with. *Ell. Prac. Rem*, 57.

Upon the bill's paſſing the commons, the door-keeper is to have fifty prints given him for the uſe of the members.

Houſe of Lords.

Houſe of Lords.

The bill, which is now intitled an act, being brought up into the Houſe of Lords, is read a firſt time the ſame day as a matter of courſe.

Ten or twelve printed bills ſhould be now left with

(*a*) All the members therefore with whom the parties have any intereſt, ſhould be requeſted to attend the third reading, ortherwiſe the bill may not be taken up to the Lords the ſame day on which it paſſes the commons.

the clerk of the houſe, or at the parliament office in Abingdon-ſtreet, for the purpoſe of being laid on the table, as no bill can be read a ſecond time till this is done. If no oppoſition be made to the bill, it will be read a ſecond time on the day following, on being moved by a lord; and upon the ſecond reading it may be committed for any day after the then next.

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The bill being read a ſecond time, the witneſſes may be ſworn that day or on any ſubſequent day; previous to which there ſhould be written the names of the witneſſes on a piece of paper, which ſhould be given to the aſſiſtant clerk of the houſe, who will put it on the table of the Houſe of Lords. Attend with your witneſſes at the houſe on the day appointed, and they will be called to the bar and ſworn.

If any of the witneſſes be quakers, it will be proper to write oppoſite to their names "To be affirmed."

There muſt be five lords to form a committee, and unleſs you requeſt two or three peers to attend, it is not eaſy to make a committee. In preparing a bill for the chairman, the names of the witneſſes ſhould be written oppoſite the allegations which they are to prove. But it is not neceſſary to prove the notices being affixed, as was done at the commons, but only the ſtate of property and conſents of the proprietors (*a*). Bills are to be delivered to lords on the committee, as was done at the committee in the commons. Any alterations may be made at the committee on the bill, but in that caſe the bill muſt be ſent back to the commons for their concurrence. After the bill has paſſed the committee, if the report be prepared, it may be reported the ſame day, and on the day following read a third time. *Ell. Prac. Rem.* 45. 92. If the bill be agreed to, the lords ſend a meſſage by two maſters in chancery, that they have agreed to the ſame: and the bill remains with the lords, if they have no amendments to it: but if any amendment be made, ſuch amendment is ſent down with the bill to receive the concurrence of the commons. If the commons do not agree to the amendments, a conference uſually follows between the members deputed from each houſe; who for the moſt part, ſettle and adjuſt the difference, but if both houſes

Lord's committee.

(*a*) If there be no witneſs to prove the ſignature of the aſſenters, and the hand writing be known by any of the lords of the committee, it will be ſufficient.

PROCEDURE FOR INCLOSURE ACTS.

remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is ſent back to the lords by one of the members, with a meſſage to acquaint them therewith. The ſame forms are obſerved, *mutatis mutandis*, when the bill begins in the Houſe of Lords. And when both houſes have done with the bill it is depoſited in the houſe of peers to wait the royal aſſent, *Blac. Com.* 184.

The royal aſſent may be given two ways.

1ſt. In perſon; in which caſe the King coming to the houſe of peers in his crown and royal robes, and ſending for the commons to the bar, the title of the bill is read, and the King's anſwer is declared by the clerk of the parliament in Norman French, "Soit fait come il eſt deſiré:" (Be it as it is deſired.) *Ibid. and Ell. Prac. Rem.* 60.

2dly, By the ſtat. 33d of Hen. 8. c. 21. the King may give his aſſent by letters patent under his great ſeal, ſigned with his hand, and notified in his abſence to the lords ſpiritual and temporal and to the commons, aſſembled together in the high houſe. And when the bill has received the royal aſſent in either of theſe ways, it is then and not before a ſtatute or act of parliament. *Ibid.*

An act of parliament, thus made, is the exerciſe of the higheſt authority that this kingdom acknowledges upon earth. It hath power to bind every ſubject in the land, and the dominions thereunto belonging; nay, even the king himſelf, if particularly named therein. And it cannot be altered, amended, diſpenſed with, ſuſpended or repealed, but in the ſame forms and with the ſame authority of parliament: for it is a maxim in law, that it requires the ſame ſtrength to diſſolve, as to create an obligation. *Blac. Com.* 185.

When the act has paſſed, 50 printed copies are given to the door-keeper of the houſe of lords.

FEES.

The fees payable in the ſeveral offices of the houſes of commons and lords in carrying private bills through parliament, amount in the whole to about 80l.—viz. about 40l. to the officers, &c. of each houſe. See *Order H. Lords*, 22d Nov. 1725. Do. *Commons*, 22d Feb. 1731.

APPENDIX.

ABSTRACT

OF

STAT. 41 GEO. III. CHAP. 109.

For conſolidating in one Act certain Proviſions uſually inſerted in Acts of Incloſure; and for facilitating the Mode of proving the ſeveral Facts uſually required at the paſſing of ſuch Acts.

THE above ſtat. having made ſome little alteration in the acts, of which the ſubſtance is given, p. 38, &c.; it has been judged expedient to give the following abſtract of its contents:

Sec. 1. enacts, That no perſon ſhall act as a commiſſioner under any future act for including lands, (except as far as relates to the power of ſigning notices of the firſt meeting and adminiſtering on oath), until he ſhall have taken the oath herein-mentioned; which oaths, and appointment of new commiſſioners, to be inrolled with the award, and a copy of the inrolment admitted as evidence.

Sec. 2. Commiſſioners declining to act, are to give notice of ſuch intention to the other commiſſioners; and no commiſſioner ſhall purchaſe any lands within any pariſh in which the incloſures are to be made, for five years then next.

Sec. 3. Commiſſioners ſhall inquire into the boundaries of pariſhes, and if not ſufficiently aſcertained, they ſhall fix them, giving previous notice of their intention ſo to do; and commiſſioners ſhall cauſe a deſcription of boundaries to be delivered to one of the churchwardens, &c. of the reſpective pariſhes, and the lords of manors, or their ſtewards. Perſons diſſatisfied may appeal to the quarter ſeſſions. Deciſion at the ſeſſions to be final.

APPENDIX.

Sec. 4. A ſurvey, admeaſurement, plan, and valuation of the lands, &c. to be incloſed ſhall be made, and kept by the commiſſioners, which ſhall be verified by the perſons making them. Proprietors may inſpect admeaſurements and plans, and take copies.

Sec. 5. Until the diviſion ſhall be completed the lands may be entered by the commiſſioners, or any perſons they may appoint, to make ſurveys, &c. Maps made at the time of paſſing acts may be uſed, without making new ones, if the commiſſioners ſhall think fit.

Sec 6. Claimants of rights in lands to be incloſed, are to deliver to the commiſſioners ſchedules of particulars, or ſhall be excluded, which claims may be inſpected, and copies taken. Objections to claims to be delivered to the commiſſioners at or before the meeting appointed for that purpoſe, or ſhall not be received except for ſpecial cauſe.

Sec. 7. Commiſſioners not authorized to determine diſputes touching rights; but they ſhall aſſign the allotments to the perſons in actual poſſeſſion of the lands, in lieu whereof the allotment is made.

Sec. 8. Commiſſioners before making ſuch allotments are to appoint public carriage roads, and prepare a map thereof to be depoſited with their clerk, and give notice thereof, and appoint a meeting, at which, if any perſon ſhall object, the commiſſioners, with a juſtice of the diviſion, ſhall determine the matter. If the commiſſioners, by any bill, ſhall be empowered to ſtop up any old road, it ſhall not be done without the order of two juſtices, and which ſhall be ſubject to appeal, to the quarter ſeſſions.

Sec. 9. The carriage roads ſhall be fenced on both ſides by ſuch of the land owners as the commiſſioners ſhall direct, and no perſon ſhall erect any gate acroſs any road, or plant any trees on the ſides, at leſs than fifty yards diſtance. The commiſſioners ſhall appoint ſurveyors, and if with a ſalary, ſuch ſalary and the expence of making the road, over and above the ſtatute duty, ſhall be raiſed as other expences, and paid on or before execution of the award. Surveyors to be ſubject to the controul of the juſtices, and ſhall account to them for monies received. Juſtices may levy rates. If ſurveyors neglect to complete roads within two years (unleſs a further time of a year be granted by the juſtices), they ſhall forfeit 20l. and the inhabitants ſhall not be chargeable

to them (except ſtatute duty), till declared to be completed at a ſpecial ſeſſions.

Sec. 10. Commiſſioners ſhall appoint private roads, &c.

Sec. 11. The graſs and herbage on roads ſhall belong to the proprietors of the lands adjoining on either ſide; and all roads which ſhall not be ſet out ſhall be allotted and incloſed. No turnpike road ſhall be altered without the conſent of the truſtees.

Sec. 12. Commiſſioners, in making allotments, are to have regard to the ſituation of houſes as well as the quantity and quality of land, as far as may be conſiſtent with general convenience.

Sec. 13. Commiſſioners may direct ſmall allotments to be laid together and ring-fenced, and ſtocked and depaſtured in common by the proprietors.

Sec. 14. Allotments to be in full compenſation for all rights in the lands, which ſhall ceaſe on notice from the commiſſioners being affixed on the door of the pariſh church.

Sec. 15. Commiſſioners may exchange by allotments, meſſuages, lands, &c. with the conſent of the proprietors, or if belonging to churches, &c. with the conſent of the biſhop and of the patron.

Sec. 16. Commiſſioners may make allotments in ſeveralty to joint tenants, or tenants in common.

Sec. 17. Perſons to accept their allotments in a limited time, or to forfeit their right.

Sec. 18. Guardians, &c. may accept for incapacitated perſons, and tenants for life ſhall accept of allotments; but the non-acceptance of guardians, &c. ſhall not prejudice the rights of incapacitated perſons who ſhall accept in a limited time after enabled ſo to do.

Sec. 19. Before execution of the award, allotments may be ditched and incloſed, with the conſent of the commiſſioners.

Sec. 20. Trees, &c. are to be allotted with the lands whereon they ſtand, the parties paying to the owners ſuch ſums as the commiſſioners ſhall direct; but in caſe of neglect, the owner may cut down and take them away.

Sec. 21. Where money is to be paid for lands, &c. and which ought to be laid out for other purchaſes to be ſettled to the ſame uſes, the commiſſioners may thereout

APPENDIX. defray a proportion of the expences of paſſing the act, and putting it in execution, &c. and if the ſurplus amount to 200l. it ſhall, as ſoon as may be, be laid out in other purchaſes, and in the mean time be paid into the bank, and applied under the direction of the Court of Chancery.

Sec. 22. If ſuch money be leſs than 200l. and upwards of 20l. it ſhall at the option of the perſon entitled to the rents of the lands, be paid into the Bank, or to two truſtees to be approved of by the commiſſioners, to be applied as before directed.

Sec. 23. If ſuch money be leſs than 20l. it ſhall be applied to the uſe of the perſon entitled to the rents of the lands, as the commiſſioners ſhall think fit.

Sec. 24. If any perſon does not accept, and incloſe and fence his allotment as the commiſſioners ſhall direct, they may cauſe it to be incloſed and fenced, and let, and receive the rents until the expences are ſatisfied, or they may charge them upon the proprietor.

Sec. 25. Within ſeven years after fencing of allotments, fences may be erected on the outſide of the ditches, and the materials carried away by the proprietors.

Sec. 26. No fences or hedges ſtanding when any act is paſſed ſhall be deſtroyed till the execution of the award, without conſent of the commiſſioners, and if aſſigned by them as a boundary or diviſion fences, they ſhall be left uncut, the perſons to whom the allotments ſhall belong making compenſation to the former owners.

Sec. 27. Where the boundary of any common fields or incloſed grounds ſhall be fenced by any mound, &c. the proprietors of the adjoining allotments ſhall not be compelled to fence them next ſuch common fields and incloſed grounds, and ſuch boundaries ſhall be maintained by the reſpective proprietors; the expences of which the commiſſioners may apportion.

Sec. 28. If any perſon ſhall deſtroy or damage any fence, &c. put under the authority of any act, he ſhall forfeit 5l. and the proprietor of the lands, &c. may give vidence.

Sec. 29. If it ſhall be provided by any act, that the expences of obtaining and carrying it into execution, ſhall be paid by the proprietors, and they neglect ſo to do, the commiſſioners may cauſe the ſame to be levied

by diſtreſs, or may take poſſeſſion of the allotments, and receive the rents, till ſatisfied. APPENDIX.

Sec. 30. Huſbands, guardians, truſtees, committees, &c. may charge allotments with ſuch ſums as the commiſſioners ſhall adjudge neceſſary for defraying the aforeſaid expences; and if perſons in poſſeſſion liable to a ſhare thereof, or enabled to charge the lands with the ſame, ſhall advance the money, the commiſſioners may mortgage the lands to them for reimburſement.

Sec. 31. Commiſſioners may deduct from allotments for charity or ſchool lands, what ſhall be deemed equal to the proportionable ſhare of the expences of paſſing and executing any act, and allot the ſame to ſuch perſons as will undertake to pay it.

Sec. 32. If it ſhall be provided by any act that the expences of obtaining and carrying it into execution ſhall be paid by ſale of part of the lands, the commiſſioners ſhall ſet out and ſell ſuch part as they think will raiſe a ſufficient ſum, and the purchaſers ſhall immediately depoſit a part of the purchaſe money, which ſhall be forfeited if the remainder be not duly paid.

Sec 33. Commiſſioners may ſummon witneſſes, who ſhall be ſubject to penalty for neglect.

Sec. 34. No witneſs ſhall be obliged to travel beyond eight miles from his home.

Sec. 35. Commiſſioners ſhall draw up an award, containing ſundry particulars, which ſhall be read and executed at a meeting of the proprietors, and proclaimed the next Sunday in the pariſh church, and then conſidered as complete. The award to be inrolled in a court of record at Weſtminſter, or with the clerk of the peace of the county, and may be inſpected and copies obtained for a certain ſum. Such award and copies to be legal evidence, and award to be binding on all parties intereſted. Commiſſioners may form maps of the grounds, which ſhall be annexed to the award, and deemed part thereof.

Sec. 36. Commiſſioners ſhall keep an account of all monies received and diſburſed, which may be inſpected at their clerk's office *gratis*. Penalty, not exceeding 10l. nor leſs than 5l. for not keeping ſuch account, or for refuſing the inſpection thereof.

Sec. 37. Monies raiſed under any act ſhall be depoſited as may be approved by a majority in value of the proprietors, and not iſſued without an order from the commiſſioners.

APPENDIX.

Sec. 38. The rector or vicar, with the consent of the bishop of the diocese, and of the patron of the living, may lease allotments for twenty-one years, upon reserving the most improved rent, payable quarterly.

Sec. 39. Penalties recoverable before a justice, and applied as directed by the commissioners.

Sec. 40. Saving of the rights of lords of manors, not expressly barred by this act.

Sec. 41. Also saving of the rights of the king and of corporations.

Sec. 42. Two justices may take affidavits of the notices required having been given, &c. in the forms in the schedule, without stamps.

Sec. 43. Persons forswearing themselves to be deemed guilty of perjury.

Sec. 44. Powers of this act to be binding only as far as not otherwise provided in any future act.

SCHEDULE to which the ACT refers.

(A.)

FORM of AFFIDAVIT of NOTICES.

A. B. of maketh oath and saith, [*or, being one of the people called Quakers*, upon his solemn affirmation, saith] That he did see a copy of the notice hereunto annexed affixed on the church door of the parish of in the county of [*or*, on the several church doors of the respective parishes of in the county of *or*, in the several counties of and] on the several Sundays hereinafter mentioned; *videlicet*, [*specifying the days on which the notices were affixed.*]

Signed *A. B.*

Sworn [*or*, solemnly affirmed] before us, two of his majesty's justices of the peace acting in and for the and subscribed in our presence, by the above named *A. B.* this day of in the year

As witness our hands and seals.

(B.)

FORM of AFFIDAVIT of CONSENT.

A. B. of maketh oath and ſaith, [*or, being one of the people called Quakers*, upon his or her ſolemn affirmation, ſaith] That he [*or* ſhe] believes himſelf [*or* herſelf] to be intereſted in the propoſed incloſure of the in the [*here deſcribe the place, whether pariſh, hamlet, or place*] in the county of , by virtue of [*here ſet forth the intereſt of the deponent*]; [*or*] that he [*or* ſhe] believes that *C. D.* of for whom he [*or* ſhe] is guardian [*et cetera, as the caſe may be*] is intereſted, *et cetera*; and that he [*or* ſhe] hath ſeen a copy of an act [*here ſet forth the title of this act*], and alſo a copy of the bill intended to be preſented to parliament, and hath ſubſcribed his [*or* her] name or hath ſet his [*or* her] mark to the ſame reſpectively, and doth conſent to the ſaid bill being paſſed into a law.

Signed or marked *A. B.*

Sworn [*or*, ſolemnly affirmed] before us, two of his Majeſty's juſtices of the peace, acting in and for the and ſubſcribed in our preſence, by the above mentioned *A. B.* this day of in the year

As witneſs our hands and ſeals,

The ſame form may be applied, *mutatis mutandis*, to the caſe of ſeveral perſons, whoſe intereſts are joint, or whoſe intereſts, though diſtinct, are of a ſimilar nature,

(C.)

FORM of AFFIDAVIT of ALLEGATIONS of the BILL.

A. B. of maketh oath and ſaith, [*or being one of the people called Quakers*, upon his or her ſolemn affirmation, ſaith] That [*here ſet forth ſuch of the ſeveral facts alleged in the preamble of the bill as are*

APPENDIX. *within the knowledge of the witneſs*] *or*, that he [*or* ſhe] is informed and verily believes that [*here ſet forth ſuch of the ſaid facts as are within the belief of the witneſs.*]

Signed *A. B.*

Sworn [*or*, ſolemnly affirmed] before us, two of his Majeſty's juſtices of the peace, acting in and for the and ſubſcribed in our preſence by the above named *A. B.* this day of in the year

As witneſs our hands and ſeals.

(D.)

FORM of AFFIDAVIT of ADMEASUREMENT.

A. B. of maketh oath and ſaith, [*or*, *being one of the people called Quakers*, upon his ſolemn affirmation, ſaith] That he has ſurveyed and admeaſured the ſeveral lands in the pariſh or hamlet of [*or* counties of] deſcribed in the bill intended to be preſented to parliament, and ſigned by the deponent, by the name [*or* names] of and that the quantity of ſuch lands amounts to and no more, according to ſuch admeaſurement, and the beſt of this deponent's judgment.

A. B.

Sworn [*or*, ſolemnly affirmed] before us, two of his Majeſty's juſtices of the peace, acting in and for the and ſubſcribed in our preſence by the above named *A. B.* this day of in the year

As witneſs our hands and ſeals.

FINIS.

INDEX

TO

THE COMMONS AND COMMONERS.

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